CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 563

PARK L. HOFFMAN, SUBSTITUTED FOR R. G. HOLSING, RECEIVER OF FIRST NATIONAL BANK OF BOSWELL, PENNSYLVANIA, PETITIONER,

vs.

HENRY I. RAUCH, ADMINISTRATOR, EMILINE B. RAUCH, LATE OF JENNER TOWNSHIP, SOMERSET COUNTY, PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 8, 1936.

CERTIORARI GRANTED JANUARY 11, 1937.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 563

PARK L. HOFFMAN, SUBSTITUTED FOR R. G. HOLSING, RECEIVER OF FIRST NATIONAL BANK OF BOSWELL, PENNSYLVANIA, PETITIONER,

vs.

HENRY I. RAUCH, ADMINISTRATOR, EMILINE B. RAUCH, LATE OF JENNER TOWNSHIP, SOMERSET COUNTY, PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX.

	Original	Print
Record from D. C. U. S., Western Pennsylvania	1	1
Caption (omitted in printing)	1	
Docket entries	1	1
Record from Court of Common Pleas of Somerset County	3	2
Docket entries	3	2
Statement of claim	4	3
Exhibit "A"—Receipt for bonds	7	5
Petition for removal	8	5
Order for removal	11	7
Præcipe to certify proceedings to D. C. U. S.	12	8
Affidavit of defense	12	8
Exhibit 1—Agreement between First National Bank of Boswell and Peoples State Bank	16	11

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 20, 1937.

—8623-C

	Original	Print
Record from D. C. U. S., Western Pennsylvania—Continued.		
Statement of evidence	24	16
Caption	24	16
Offers in evidence	24	17
Admissions of facts	30	20
Plaintiff's motion for directed verdict	31	21
Instruction to jury	31	21
Reporter's certificate (omitted in printing)	32	
Judge's certificate to statement of evidence	32	22
Verdict	33	22
Præcipe for judgment	33	22
Judgment	33	23
Motion for rule for payment of judgment in full	33	23
Order granting rule to show cause	35	24
Answer to rule	35	24
Opinion of the Court, McVicar, J.	39	27
Decree	41	28
Petition for and order allowing appeal	41	29
Assignments of error	43	30
Præcipe for record	44	31
Motion for amendment of record	45	31
Certificate of clerk (omitted in printing)	46	
Proceedings in U. S. C. C. A., Third Circuit	47	33
Minute entry of argument and submission	47	33
Opinion, Davis, J.	48	33
Judgment	54	38
Clerk's certificate	55	38
Order allowing certiorari	56	39

[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 7545. Law

HENRY I. RAUCH, Administrator; EMILINE B. RAUCH, Late of Jenner Township, Somerset County, Pennsylvania, Appellee,

vs.

PARK L. HOFFMAN, Substituted for R. G. HOLSING, Receiver of First National Bank, of Boswell, Pennsylvania, Appellant

DOCKET ENTRIES

May 26, 1933. Exemplification of Record from Common Pleas Court of Somerset County filed.

Sept. 20, 1933. Præcipe for issue filed.

Feb. 21, 1934. Trial opens before McVicar, J.

Feb. 21, 1934. Trial Closed.

Feb. 21, 1934. The Jury find a verdict in favor of the Plaintiff in the sum of $402.08 under binding instructions by the Court—Verdict filed.

[fol. 2] Feb. 21, 1934. Trial memo filed.

Mar. 20, 1934. Præcipe for judgment filed.

Mar. 20, 1934. Pursuant to above præcipe judgment is hereby entered on the verdict.

Mar. 21, 1934. On petition of Plaintiff order entered granting rule on R. G. Holsing, receiver to show cause why an order should not be entered directing said receiver to pay in full as preferred item the verdict and resulting judgment therefrom of $402.08 together with costs rule returnable first Monday in April, 1934.

Mar. 23, 1934. Acceptance of service of rule filed.

Mar. 23, 1934. Answer of R. G. Holsing, Receiver to rule filed.

Jan. 10, 1935. Opinion filed and entered directing that a decree be submitted in accordance with said opinion.

Jan. 17, 1935. Decree filed and entered directing that the judgment herein entered in the sum of $402.08 is founded on facts and circumstances having all the attributes of a

special deposit and as such special deposit is entitled to participate in the distribution of the assets of the First National Bank of Boswell, Exception to defendant granted.

Mar. 7, 1935. On petition of defendant, Order entered allowing appeal, no bond to be filed; Assignments of Error filed.

Mar. 7, 1935. Præcipe for printing record filed.

July 22, 1935. On motion of plaintiff order entered substituting name of Park L. Hoffman for R. G. Holsing, Receiver.

[fol. 3] July 22, 1935. Præcipe filed for appearance of Joseph Levy, attorney for plaintiff.

IN COURT OF COMMON PLEAS OF SOMERSET COUNTY, MAY TERM, 1933

No. 45

HENRY I. RAUCH, Administrator; EMILINE B. RAUCH, Late of Jenner Township, Somerset County, Pa.,

vs.

R. G. HOLSING, Receiver, First National Bank, Boswell, Pa.

DOCKET ENTRIES

Feb. 21, 1933. Summons in assumpsit issued, returnable second Monday in May, 1933.

Feb. 21, 1933. Plaintiff's statement filed.

Mar. 2, 1933. Sheriff returned summons served on defendant, with copy of plaintiff's statement.

Apr. 15, 1933. Petition filed to remove cause to U. S. District Court.

Apr. 15, 1933. Bond for removal approved and filed.

Apr. 15, 1933. On motion of plaintiff order entered that this court proceed no further in the action and that the cause be transferred to the U. S. District Court for the Western District of Pa.

Apr. 15, 1933. Præcipe filed to certify and transmit the cause to U. S. District Court.

Apr. 24, 1933. Affidavit of defense filed.

[fol. 4] IN COURT OF COMMON PLEAS OF SOMERSET COUNTY

[Title omitted]

PLAINTIFF'S STATEMENT OF CLAIM—Filed February 21, 1933

The Plaintiff, Henry I. Rauch, Administrator of Emiline B. Rauch, claims of the Defendant, R. C. Holsing, Receiver of the First National Bank of Boswell, the sum of Four Hundred Twenty-five and 44/100 ($425.44) Dollars, together with interest thereon from the 15th day of October, 1932 upon a Cause of Action, whereof the following is a statement:

First. The Plaintiff Henry I. Rauch, is the Administrator of Emiline B. Rauch, deceased, late of Jenner Township, Somerset County, Pennsylvania, who died June 2nd, 1932 and which estate is numbered 113 of the year 1932, in the Orphans Court of Somerset County, Pennsylvania.

Second. R. C. Holsing, is the Receiver duly appointed by the Comptroller of Currency of the United States of America, of the First National Bank of Boswell, a Corporation existing by virtue of the laws of the United States and [fol. 5] which Corporation was declared insolvent on the — day of January, 1932.

Third. That on the 9th day of April, 1929, all the assets, money, property, deposits, and Choses in Action of the People's State Bank of Boswell, a Pennsylvania Banking Corporation, were turned over to the First National Bank of Boswell. That the People's State Bank of Boswell ceased to function as a Banking Institution on that date and among other things the First National Bank of Boswell, became the liquidating agent of all the assets and property of the People's State Bank and took over the deposits and property held under Bailment Agreements. That the said merger and liquidation contract made by the two aforesaid Banks was duly approved by the Treasurer of the United States and the Secretary of Banking for the Commonwealth of Pennsylvania.

Fourth. That on the 10th day of February, 1922, Emiline B. Rauch, the above named decedent, left with the People's State Bank of Boswell, for "Safe Keeping Only" five Lib-

erty Bonds of the United States of America, each in the amount of One Hundred ($100.00) Dollars, and being of the series of 1933, and 1938, and which Bonds were numbered and marked as follows:

A 02183691
B 02183692
C 02183693
D 02183694
E 02183695

[fol. 6] which receipt is hereto attached and marked "Exhibit A."

Fifth. That on the 9th day of April, 1929, possession and custody of the five aforesaid Liberty Bonds was transferred by the People's State Bank of Boswell, to the First National Bank of Boswell, and thereafter Emiline B. Rauch, the above named decedent, called at the First National Bank of Boswell, and had the Cashier, P. M. Weimer, detach the interest coupons from the aforesaid bonds and cashed them at the aforesaid First National Bank. That on or about the 29th day of Sept., 1931, the interest coupons on the said Liberty Bonds were last detached from the Bonds and at which time the said Bonds were in the custody and possession of the First National Bank of Boswell, and which date was the last time that the said Emiline B. Rauch, or her proper representative ever saw the said Liberty Bonds, with the exception of Bond A 02183691, which was delivered to the decedent's administrator by the Receiver of the First National Bank on or about the 27th day of May, 1932.

Sixth. The Plaintiff believes and is informed and therefore avers that on or about the 15th day of December, 1931, the First National Bank of Boswell, through its Cashier, P. M. Weimer, converted to its own use and benefit four of the said Liberty Bonds, numbered and identified as follows:

B 02183692
C 02183693
D 02183694

[fol. 7]

E 02183695

and sold the same to Josiah D. Lohr of Jenner Cross-Roads, Somerset County, Pennsylvania, and received therefrom the

full face and market value of the said Liberty Bonds. That the said sale and conversion of the said Bonds was without the knowledge or the consent of the Plaintiff's decedent.

Seventh. Repeated demands have been made to the Receiver, for the return of the said Bonds or the value thereof at the date of conversion on or about the 15th day of December, 1931, but the said Receiver has neglected or refused to return the said Bonds or pay the value thereof.

Wherefore, this suit.

Henry I. Rauch, Administrator of Emiline B. Rauch, Dec'd.

(Sworn to by Henry I. Rauch.)

EXHIBIT "A" TO STATEMENT OF CLAIM

Received February 10th, 1922.

A 02183691
B 02183692
C 02183693
D 02183694
E 02183695

Emiline B. Rauch
For safe keeping only.

People's State Bank.
M. E. Wagner.
A. Casbeir.

[fol. 8] IN COURT OF COMMON PLEAS OF SOMERSET COUNTY

PETITION TO REMOVE CAUSE TO THE DISTRICT COURT OF THE UNITED STATES—Filed April 15, 1933

To the Honorable Norman T. Boose, President Judge of Said Court:

The petition of R. G. Holsing, Receiver of First National Bank of Boswell, Pennsylvania, respectfully represents:

First. The First National Bank of Boswell, Pennsylvania, was a banking association created and existing under the laws of the United States of America relating to National Banks, having its domicile and place of business in

the Borough of Boswell, County of Somerset, and State of Penna.

Second. On January 26th, 1932, the First National Bank of Boswell, Pennsylvania, was found and declared to be insolvent by the Comptroller of the Currency of the United States of America, whereupon the said bank was closed, and on the 9th day of February, 1932, the Comptroller of the Currency appointed your petitioner Receiver under the provisions of the laws of the United States relating to National Banks; the order appointing your petitioner such Receiver being recorded in Somerset County, Pa. in Deed Book volume 103, page 276, reference to which is hereby made for the purpose of showing the same, to the same effect as [fol. 9] though it had been fully set forth in this petition. Your petitioner has duly qualified as such Receiver and is now winding up the affairs of the said bank under the direction and control of the Comptroller of the Currency.

Third. That an action has been brought in your Honorable Court by the plaintiff above named against your petitioner, the defendant above named, to No. 45 May Term, 1933, of which action the District Court of the United States has jurisdiction.

Fourth. That the plaintiff is a citizen of the State of Pennsylvania and a resident of the Western District thereof, and was such at the time of the bringing of said action.

Fifth. Your petitioner further avers that by reason of the said matters herein averred, a controversy has arisen under the laws of the United States, and that your petitioner as Receiver is engaged in the business of winding up the affairs of a National Bank.

Sixth. Your petitioner represents that a summons in assumpsit in the above stated action was issued 21st February, 1933, and the said writ and a copy of the Plaintiff's Statement of Claim was served on R. G. Holsing, your petitioner, by the sheriff of Somerset County, March 1st, 1933, but that no affidavit of defense was filed to said claim for the reason that negotiations have been pending with the plaintiff, through his counsel, Leland W. Walker, with a view to having a claim filed with the Receiver, your peti- [fol. 10] tioner, for a partial dividend or payment on the

plaintiff's claim; that in pursuance of said negotiations and at the request of the said Leland W. Walker, your petitioner furnished said Leland W. Walker a form of proof or claim to submit on or about the 6th day of April, 1933; but that on the 10th day of April, 1933, the said Leland W. Walker advised C. L. Shaver, the attorney for your petitioner, that his client, the plaintiff above named, has refused to file said claim and desired now to proceed with the above stated action, for which reason your petitioner, the defendant, has not filed an affidavit of defense to the above action and no judgment has been taken for want thereof.

Seventh. Your petitioner represents that he desires to remove the said suit or action from your Honorable Court to the District Court of the United States in and for the Western District of Pennsylvania at Pittsburgh, Pennsylvania, and that for the reasons set forth in paragraph "Sixth" the time limit for such removal has not expired.

Eighth. Your petitioner further represents that he has executed and presents herewith for filing a bond with good and sufficient surety that your petitioner will enter in said District Court on the first day of its next session for paying all costs that may be awarded by the District Court if the said Court should hold that the said suit was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays your Honorable Court to accept this petition and bond and proceed no further in [fol. 11] such suit, and that an order be made to file the said suit in the District Court of the United States for the Western District of Penna.

R. G. Holsing, Receiver First National Bank of Boswell, Penna.

(Sworn to by R. G. Holsing.)

IN COURT OF COMMON PLEAS OF SOMERSET COUNTY

ORDER FOR REMOVAL

On the annexed petition of R. G. Holsing, Receiver of the First National Bank of Boswell, Pennsylvania, verified the 13th day of April, 1933, and upon all the papers and pro-

ceedings in the cause, and the said defendant having made and filed a bond with good and sufficient sureties as required by law, and having in all other respects complied with the statute in such case made and provided,

Now, 15th day of April, 1933, on motion of C. L. Shaver, attorney for the said petitioner, the defendant, it is ordered that this Court does hereby accept the said petition and bond, and that it proceed no further in this action, and that the cause be and hereby is transferred and removed to the District Court of the United States for the Western District of Pennsylvania as provided by law.

By the Court.

Norman T. Boose, P. J.

[fol. 12] In Court of Common Pleas of Somerset County

Præcipe to Certify Proceedings to U. S. Court—Filed April 15, 1933

To Walter E. McNutt, Esq., Prothonotary:

You are hereby notified that the above cause is one in which R. G. Holsing, Receiver First National Bank of Boswell, Pa. is a party, and that as such party is winding up the affairs of the said First National Bank of Boswell, Pennsylvania; and that all actions brought by or against him are strictly within the jurisdiction of the Federal Courts, in this instance the District Court of the United States for the Western District of Pennsylvania.

You will, therefore, certify and transmit the cause now pending before you to the District Court of the United States for the Western District of Pennsylvania.

C. L. Shaver, Attorney for R. G. Holsing, Receiver, First National Bank, Boswell, Pa.

In Court of Common Pleas of Somerset County

Affidavit of Defense—Filed April 24, 1933

Now, 24th day of April, 1933, comes R. G. Holsing, Receiver of the First National Bank of Boswell, Pennsylvania, and in answer to the plaintiff's statement of claim avers:

First. Admitted.

[fol. 13] Second. Admitted, with the further averment that the said First National Bank of Boswell, Pennsylvania, was found and declared by the Comptroller of the Currency to be insolvent on the 26th day of January, 1932.

Third. The averments in the third paragraph of the plaintiff's statement are admitted in so far as there was a contract to take over the assets of the Peoples State Bank of Boswell, Pa., by the First National Bank of Boswell, Pennsylvania; but all legal conclusions as to the effect of the said contract and as to whether or not the same constituted the First National Bank of Boswell, Pa. liquidating agent or whether a merger of the said institutions occurred is deemed to be irrelevant and immaterial, a copy of the said agreement is marked defendant's Exhibit 1, hereto attached and made a part of this Affidavit of Defense as setting forth the actual terms thereof.

Fourth. Admitted, save that the duplicate of the receipt held by Emiline B. Rauch as furnished this defendant by Leland W. Walker, Attorney for the plaintiff, bears date of July 10, 1932, instead of 10th day of February, 1922.

Fifth. This defendant has no knowledge of the specific facts averred in paragraph five of the plaintiff's statement, and believes the same to be substantially correct as therein averred.

Sixth. The facts as set forth in paragraph 6th of the plaintiff's statement of claim as therein averred are denied, and as this defendant avers the true facts with rela- [fol. 14] tion thereto are as follows: on the 21st day of January, 1932, P. M. Weimer, who was then the Cashier of the First National Bank of Boswell, Pa. sold the four bonds specifically mentioned in the sixth paragraph of the plaintiff's statement to Josiah or Rose Lohr, customers and depositors of the First National Bank of Boswell, and from said date charged their said account with the sum of $400.24 as the purchase price of the said bonds; and on the 22nd day of January, 1932, the said P. M. Weimer, drew a Cashier's check on the First National Bank of Boswell, Pa. payable to the order of Post & Flagg, Brokers, in the sum of $402.08 for the purchase of four Liberty Bonds of the par value of $100.00 each in lieu of and substitution for the bonds alleged to be those of Emiline B. Rauch, sold

by the said P. M. Weimer unto Josiah or Rose Lohr; and that before the said check was presented for payment the First National Bank of Boswell, Pa. was found and declared to be insolvent and payment of the said check was prevented thereby.

Seventh. It is admitted that Leland W. Walker, as attorney for the plaintiff, has made demand for the return of the said bonds upon the Receiver of the First National Bank of Boswell, Pa., but this defendant avers that it has been unable to return the said bonds for the reasons herein averred inasmuch as the check remitted to Post and Flagg for the purchase of the bonds in lieu of and in substitution for those so delivered by the said P. M. Weimer, as aforesaid, has never been paid for the reason that it was not presented to the First National Bank of Boswell, Pa. until [fol. 15] the said bank was found and declared to be insolvent and payment thereof thus prevented by reason of such insolvency but this defendant avers that he has at all times agreed to and offered to pay unto the plaintiff a dividend such as has been declared and awarded to general depositors on the sum of $402.02, that being the amount of the check aforesaid and the liability, if any, of this bank to the plaintiff as of the date of its insolvency, to-wit: January 26th, 1932.

Eighth. For further answer to the plaintiff's statement, this defendant avers that as he is advised and believes the liability of the First National Bank of Boswell, Pa., if any, upon the facts averred in the plaintiff's statement was fixed and determined as of the date of its insolvency, to-wit: January 26th, 1932; and that the said bank is now in the hands of this defendant for the purpose of winding up the affairs thereof in accordance with the laws of the United States governing insolvent banks, and that the plaintiff is not entitled to payment or compensation on the sum of $425.44, but only on the sum of $402.08, that being the actual market value of the bonds of the plaintiff's intestate, Emiline B. Rauch, as of the date of the sale and alleged conversion thereof, and the First National Bank of Boswell, Pa. being insolvent, interest on said amount cannot be allowed.

Ninth. This defendant further avers that under the terms of the said agreement for safekeeping as averred in

paragraph four of the plaintiff's statement of claim, the [fol. 16] acts of the said Park M. Weimer were unauthorized and ultra vires, and that the First National Bank of Boswell, Pa., is not liable unto the plaintiff in any sum whatsoever by reason of the fact that the said Park M. Weimer was acting outside of the scope of his employment as said Cashier and outside of the terms of the said alleged agreement or contract by which the said bank became a bailee of the said bonds for safekeeping only, and further avers that no action was ever taken by the Board of Directors of said bank at any time authorizing said action upon the part of the said Park M. Weimer, nor have the Board of Directors at any time subsequent thereto, nor has this defendant as Receiver thereof, done any act, matter or thing in ratification of the acts of the said Park M. Weimer,

All of which facts this defendant avers he shall be able to maintain upon the trial of this cause.

R. G. Holsing, Receiver First National Bank, Boswell, Pa.

(Sworn to by R. G. Holsing.)

EXHIBIT 1 TO AFFIDAVIT OF DEFENSE

Copy of the Agreement Between the First National Bank of Boswell and the Peoples State Bank, Boswell, Pennsylvania

This agreement made and concluded this ninth day of April, 1929 by and between The Peoples State Bank of Boswell, Penna., a corporation organized and existing under the laws of the state of Pennsylvania and having its [fol. 17] principal place of business in the borough of Boswell, County of Somerset, state of Penna., party of the first part, and,

The First National Bank of Boswell, Pennsylvania, an association organized and existing under the Banking Laws of the United States, and having its principal place of business in the borough, county and the state aforesaid, herein after called party of second part.

Witnesseth, that the parties hereto, for and in consideration of the mutual covenants and promises herein contained, do hereby agree as follows:—

First. The party of the first part hereby grants bargains, sells, assigns, transfers and sets-over unto the party of the second part, all of its property and assets of every kind, character and description, real, personal and mixed, as owned and possessed by it, at the close of its business on April the Ninth, 1929, and including all of its cash, currency, gold, silver, specie, notes, whether promissory, judgment or collateral, together with any and all collateral securing said notes, trade acceptances, accounts receivable, choses in action, stocks, bonds, judgments and mortgages, together with the bonds thereby secured, as well as all stockholders' liability under the laws of the State of Penna. Complete schedules of said property and assets shall forthwith be made, which schedules shall contain a sufficient description of each item of property to reasonably identify it, and shall be authenticated by the signatures of the parties hereto and their respective seals, and shall thereupon be attached hereto, and be and become a part hereof. The party of the first part shall, at the close of its business in April the ninth, 1929 deliver to the party of the second part full and complete possession of all its property and [fol. 18] assets, together with such books, records and papers as pertain thereto and which may be required by the party of the second part in the collection thereof. The party of the first part shall, from time to time, on request of the party of the second part, make, execute and deliver such deeds, assignments, transfers and assurances as may be required to legally vest title to said property and assets in the party of the second part.

Second. In consideration whereof, the party of the second part hereby assumes and agrees to pay and discharge all of the liabilities and obligations of the party of the first part, other than the liability to its stockholders as such, existing at the close of its business on April the ninth, 1929, and as shown by its books and records, which liabilities and obligations shall be paid and discharged in the manner and at the time payment and discharge thereof may be legally required, but the party of the second part may anticipate payment thereof. In determining the liability of party of the first part, to its depositors, interest shall be calculated

thereon to April 9th, 1929, at the rate agreed upon by the party of the first part and such depositors. The party of the first part shall, at the close of business on April the ninth, 1929, deliver to the party of the second part full and complete possession of all individual ledgers, and such other books, records and papers as the party of the first part may have in connection with the accounts between it and each of its depositors.

Third. The party of the second part shall credit on its books, as a liability to its depositors, the amount payable by the party of the first part to its depositors, as shown by its books and records. The party of the second part shall open on its books another account to be designated "Peoples [fol. 19] State Bank Asset Account" or some other appropriate name, in which it shall charge as an asset all of the property received from the party of the first part, at an amount equal to the liability assumed. In addition thereto, the party of the second part shall open another account to be designated "Peoples State Bank Administration Account", against which shall be charged all sums paid by the party of the second part in behalf of the party of the first part, including expenses, not credited as hereinbefore provided, as a liability to the depositors of the party of the first part.

Fourth. The party of the second part shall, from time to time, absorb and liquidate the property and assets of the party of the first part, and shall credit to the asset account all sums realized by absorption and liquidation. The property and assets of the party of the first part shall be kept separate and distinct until absorbed or liquidated, and all interest and income produced and yielded thereby shall be credited to an account to be designated "Peoples State Bank Income Account". This account shall be closed at such convenient time as the party of the second part may fix, by charging the amount thereof against the asset account.

Fifth. The party of the second part shall, within the period of three (3) years, absorb and liquidate all of the property and assets of the party of the first part, or a sufficient amount thereof to equal the obligations and liabilities hereby assumed, including the expenses of liquidation, but the time for such absorption and liquidation m-y be ex-

tended by the party of the second part with the consent of the Comptroller of the Currency and the Secretary of Banking of the State of Pennsylvania. If at any time, during the said period of three years, or any extension thereof, the [fol. 20] absorption and liquidation shall have been so far completed that the whole liability of the party of the first part to the party of the second part is discharged, or if the party of the first part shall pay and discharge such part thereof as may at any time during such period remain unpaid and subsisting, the party of the second part shall grant, bargain, sell, assign, transfer and set-over to the party of the first part, or to liquidation Trustees which may be appointed, all of the remaining unabsorbed and unliquidated property and assets of the party of the first part.

Sixth. The party of the second part shall charge to the party of the first part in the administration account hereinbefore mentioned, all expenses incurred in the administering of the property and assets of the party of the first part, including the salaries of such employees as may be necessary for that purpose. The party of the second part may, for the protection of said property and assets, purchase property at judicial or other sale, which, when so purchased, shall be and become a part of the unliquidated assets of the party of the first part, and the party of the second part may compound, compromise and adjust the claims in the exercise of its sound discretion, but no such action shall be taken without conference and consultation with the liquidation trustees of the party *of the party* of the first part. The party of the second part shall not sell or dispose of any property or compromise and claim for a sum less than the liquidating trustees are willing to pay.

Seventh. If at anytime within three years, any asset shall be determined as a loss the right is reserved to substitute such assets for cash or good assets from any collateral that was taken from the party of the first part. The party of the second part shall have the right to renew a [fol. 21] note at anytime it sees fit without affecting it's right of recourse on substitution.

Eighth. The party of the first part will not again engage in business without the consent of the party of the second part, and in order to effectuate the assignment of the stockholders liability under the law of the State of Pennsylvania

hereinbefore made and to better enable the party of the second part to enforce such liability, the corporate existence of the party of the first part shall be continued until the absorption and liquidation of its assets is completed, and the liability of the stockholders may be enforced for the payment and collection of any deficit that may result from the absorption and liquidation of such assets. To better evidence this liability, the party of the first part will execute, pursuant to resolution of its Board of Directors, duly adopted, a note payable to the party of the second part in thirty (30) days after demand, in the sum of Thirty Thousand ($30,000.00) dollars, which note shall be authenticated by the signatures of the President and Cashier of the party of the first part and its corporate seal.

Ninth. The party of the first part will forthwith elect three of the members of its Board of Directors as liquidation trustees, to represent the party of the first part as hereinbefore stated, and which trustees shall have such duties and powers in connection with the absorption and liquidation of the property and assets of the party of the first part as may have been conferred upon them by its Board of Directors.

Tenth. This agreement was read at length, duly passed and adopted at a meeting of the Board of Directors of the [fol. 22] Peoples State Bank of Boswell, Penna. duly and regularly called and held on April the ninth, 1929, and by resolution regularly adopted, the President and Cashier were authorized empowered and directed to execute the same, for and on behalf of the said bank.

The Board of Directors of the first part- by a resolution regularly adopted on April the ninth, 1929 has called a special meeting of its stockholders for the purpose of ratifying and approving this agreement and in the event the stockholders shall fail to ratify and approve the same, the party of the second part shall return to the party of the first part all of the property and assets set forth in the schedules to be hereto attached, or in the event any of said assets have been collected or sold, the equivalent thereof, excepting however a sufficient amount of said assets to be selected by the party of second part, to cover any deposit obligations of the party of the first part already paid and discharged by the party of the second part. The party of the second

part shall also return all records, books and papers delivered to it by the party of the first part, and this agreement shall, thereupon, be and become null and void.

Eleventh. This agreement was read at length, duly passed and adopted at a meeting of the Board of Directors of the First National Bank of Boswell, Penna., duly and regularly called and held on the ninth of April, 1929 and by resolution regularly adopted, the President and Secretary were authorized, empowered and directed to execute the same for and on behalf of the said bank.

Twelfth. This agreement shall extend to and bind the successors and assigns of the parties hereto.

[fol. 23] In Witness Whereof, the parties hereto have caused these presents to be signed in their respective corporate names by their Presidents, their corporate seals to be hereunto affixed, attested by the Cashiers of the said banks, all the day and year first above written.

Peoples State Bank of Boswell, Pa., by Ferdinand Sann, President. (Corporate Seal.)

Attest: Robt. Bittner, Cashier.

First National Bank of Boswell, Pa., by R. W. Lohr, President. (Corporate Seal.)

Attest: P. M. Weimer, Cashier.

[fol. 24] In United States District Court

[Title omitted]

Statement of Evidence

And now, Tuesday, February 20, 1934, the above entitled matter came on for trial before Hon. Nelson McVicar, Judge, and a Jury, at Pittsburgh, Pennsylvania.

Counsel Present:

For Plaintiff: Leland W. Walker, Esq.
For Defendant: C. L. Shaver, Esq.

Harriet Cole Thomas, Official Reporter, by Eva McBride.

(Jury sworn.)

Mr. Walker: I now offer the first paragraph of the plaintiff's Statement of Claim, together with the corresponding paragraph of the Affidavit of Defense:

[fol. 25] "1. (Statement of Claim.) The Plaintiff, Henry I. Rauch, is the Administrator of Emiline B. Rauch, deceased, late of Jenner Township, Somerset County, Pennsylvania, who died June 2nd, 1932, and which estate is numbered to No. 113 of the year 1932, in the Orphans Court of Somerset Co., Pennsylvania."

"1. (Affidavit of Defense.) Admitted."

I now offer the second paragraph of plaintiff's Statement of Claim, together with the corresponding paragraph of the Affidavit of Defense, it being understood that the 26th day of January, 1932, was the date that the Comptroller of Currency declared this defendant Bank insolvent:

"2. (Statement of Claim.) R. G. Holsing is the Receiver duly appointed by the Comptroller of Currency of the United States, of the First National Bank of Boswell, a corporation existing by virtue of the laws of the United States and which corporation was declared insolvent on the — day of January, 1932."

"2. (Affidavit of Defense.) Admitted, with the further averment that the said First National Bank of Boswell, Pennsylvania, was found and declared by the Comptroller of the Currency to be insolvent on the 26th day of January, 1932."

I now offer the third paragraph of plaintiff's Statement of Claim, together with the corresponding paragraph of the Affidavit of Defense, admitting the averments in the Plaintiff's Statement:

[fol. 26] "3. (Statement of Claim.) That on the 9th day of April, 1929, all the assets, money, property, deposits, and choses in action of the People's State Bank of Boswell, a Pennsylvania Banking Corporation, were turned over to the First National Bank of Boswell. That the People's State Bank of Boswell ceased to function as a banking institution on that date and among other things the First National Bank of Boswell became the liquidating agent of

all the assets and property of the People's State Bank and took over the deposits and property held under bailment agreements. That the said merger and liquidation contract made by the two aforesaid Banks were duly approved by the Treasurer of the United States and the Secretary of Banking for the Commonwealth of Pennsylvania."

"3. (Affidavit of Defense.) The averments in the third paragraph of the plaintiff's statement are admitted in so far as there was a contract to take over the assets of the People's State Bank of Boswell, Pa. by the First National Bank of Boswell, Pennsylvania; but all legal conclusions as to the effect of the said contract and as to whether or not the same constituted the First National Bank of Boswell, Pa., liquidating agent or whether a merger of the said institutions occurred is deemed to be irrelevant and immaterial, a copy of the said agreement is marked defendant's Exhibit 1, hereto attached and made a part of this Affidavit of Defense as setting forth the actual terms thereof."

Mr. Shaver: Well, there is an admission of the facts as to [fol. 27] the relevancy. The objection was made as immaterial, and for the purpose of the record this goes in.

Mr. Walker: I now offer the fourth paragraph of the plaintiff's Statement of Claim, together with the corresponding paragraph of the Affidavit of Defense:

"4. (Statement of Claim.) That on the 10th day of February, 1922, Emiline B. Rauch, the above named decedent, left with the People's State Bank of Boswell, for 'Safe Keeping Only' five Liberty Bonds of the United States of America, each in the amount of One Hundred (100.00) Dollars, and being of the series of 1933, and 1938, and which bonds are numbered and marked as follows: A 02183691, B 02183692, C 02183693, D 02183694, and E 02-183695, which receipt is hereto attached and marked 'Exhibit A'."

"4. (Affidavit of Defense.) Admitted, save that the duplicate of the receipt held by Emiline B. Rauch as furnished this defendant by Leland W. Walker, Attorney for the plaintiff, bears date of July 10, 1922, instead of the 10th day of February, 1922."

I now offer the fifth paragraph of plaintiff's Statement of Claim, together with the corresponding paragraph of the Affidavit of Defense:

"5. (Statement of Claim). That on the 9th day of April, 1929, possession and custody of the five aforesaid Liberty Bonds was transferred by the People's State Bank of Bos- [fol. 28] well, to the First National Bank of Boswell, and thereafter Emiline B. Rauch, the above name- decedent, called at the First National Bank of Boswell, and had the Cashier, P. M. Weimer, detach the interest coupons from the aforesaid bonds and cashed them at the aforesaid First National Bank. That on or about the 29th day of Sept. 1931, the interest coupons on the said Liberty Bonds were last detached from the bonds and at which time the said bonds were in the custody and possession of the First National Bank of Boswell, and which date was the last time that the said Emiline B. Rauch, or her proper representative, ever saw the the said Liberty Bonds, with the exception of Bond A 02183691, which was delivered to the decedent's Administrator by the Receiver of the First National Bank on or about the 27th day of May, 1932."

"5. (Affidavit of Defense). This defendant has no knowledge of the specific facts averred in paragraph five of the Plaintiff's Statement, and believes the same to be substantially correct as therein averred."

Mr. Shaver: No objection.

Mr. Walker: I now offer the sixth paragraph of plaintiff's Statement of Claim, together with the corresponding paragraph of Affidavit of Defense:

"6. (Statement of Claim). The Plaintiff believes and is informed and therefore avers that on or about the 15th [fol. 29] day of December, 1931, the First National Bank of Boswell, through its Cashier, P. M. Weimer, converted to its own use and benefit four of the said Liberty Bonds, numbered and identified as follows: B 02183692, C 02183693, D 02183694 and E 02183695, and sold the same to Josiah D. Lohr, of Jenner Cross-Roads, Somerset County, Pennsylvania, and received therefrom the full face and market value of the said Liberty Bonds. That the said sale and conversion of the said bonds was without the knowledge or the consent of the Plaintiff's decedent."

Mr. Shaver: Just a moment. Those offers will not place an admitted fact upon the record, because the facts as pleaded in the sixth paragraph of the Statement of Claim are denied by the Affidavit of Defense. "On the 21st day of January, 1932, P. M. Weimer, who was then the Cashier of the First National Bank of Boswell, Pa., sold the four bonds specifically mentioned in the sixth paragraph of the plaintiff's Statement"—without the knowledge or consent of the plaintiff's intestate—"to Josiah or Rose Lohr"—husband and wife who were—"customers and depositors of the First National Bank of Boswell, Pa., and on said date charged their said account with the sum of $400.24 as the purchase price of the said bonds"—so sold to them, and that the said sale and conversion of the said bonds was without the knowledge or consent of the plaintiff's decedent —"and on the 22nd day of January, 1932, the said P. M. Weimer"—as Cashier—"drew a Cashier's check on the First National Bank of Boswell, Pa. payable to the order [fol. 30] of Post & Flagg, Brokers, in the sum of $402.08 for the purchase of four Liberty Bonds of the par value of $100.00 each in lieu of and substitution for the bonds alleged to be those of Emiline B. Rauch, sold by the said P. M. Weimer unto Josiah or Rose Lohr; and that before the said check was presented for payment the First National Bank of Boswell, Pa. was found and declared to be insolvent and payment of the said check was prevented thereby."

ADMISSIONS

Mr. Walker: 7. It is admitted that Leland W. Walker, Attorney for the plaintiff, has made demand for the return of the said bonds upon R. G. Holsing, Receiver of the First National Bank of Boswell, Pa., and that the same have not been returned by reason of their prior sale by the said P. M. Weimer when Cashier of the First National Bank of Boswell, Pa., and for the reason that the check remitted to Post & Flagg for the purchase of bonds in lieu of and in substitution for those delivered by P. M. Weimer aforesaid, has never been paid, as it was not presented to the First National Bank of Boswell, Pa., on which it was drawn, until the said Bank was found and declared to be insolvent, and payment thereof thus prevented by reason of such insolvency.

It is agreed that the defendant has at all times agreed and offered to pay unto the plaintiff a dividend such as has been declared and awarded to general depositors on the said sum of $402.08, and that the claimant has refused to accept the said offer of a dividend, claiming the relation of bailer [fol. 31] or bailee existed between the First National Bank and his decedent and therefore entitled to the bail bond or the full value thereof.

8. It is agreed, for the purpose of this case that the market value of the bonds sold and converted by the said P. M. Weimer on the 26th day of January, 1932, was the sum of $402.08.

MOTION FOR DIRECTED VERDICT

Mr. Walker: Counsel for plaintiff moves the Court to direct this jury to find a verdict in favor of the plaintiff in the sum of $402.08, as of the date of insolvency.

(Argument of counsel).

INSTRUCTION OF THE COURT

(McVicar, J.)

Gentlemen of the Jury:

The parties in this case have stipulated the facts, or else the facts are not denied under the pleadings, so that the question involved in this case becomes one of law rather than fact. The burden is upon the Court to determine that question of law. I have decided that the question of law shall be decided in favor of the plaintiff, and therefore I am instructing you now to render a verdict in favor of the plaintiff in the sum of $402.08. That relieves you from any responsibility in the case, excepting now that the Foreman should sign the verdict form.

[fol. 32] Reporter's certificate to foregoing transcript omitted in printing.

IN UNITED STATES DISTRICT COURT

JUDGE'S CERTIFICATE

I, Nelson McVicar, Judge of the District Court of the United States for the Western District of Pennsylvania, do hereby certify that the foregoing is a true transcript of all the evidence, offers of counsel, objections thereto, rulings thereon and exceptions thereto, and the Instruction of the Court, in the case of Henry I. Rauch, Administrator, Emiline B. Rauch, late of Jenner Township, Somerset County, Pennsylvania, vs. R. G. Holsing, Receiver of First National Bank, of Boswell, Pennsylvania, at No. 7545 Law; all of which, so certified, is ordered to be filed and to become a part of the record this 14 day of March, 1935, at Piftsburgh, Pennsylvania.

N. McVicar, Trial Judge.

[fol. 33] IN UNITED STATES DISTRICT COURT

VERDICT—Filed February 20, 1934

And now, to wit: Feb. 20, 1934, we, the Jurors empaneled in the above-entitled case, find—a verdict for the plaintiff in the sum of $402.08 under binding instructions by the court.

M. M. Weirich, Foreman.

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR JUDGMENT—Filed March 20, 1934

To J. Wood Clark, Esquire, Clerk:

SIR:

Kindly enter judgment on the verdict in the above entitled case.

Leland W. Walker, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

JUDGMENT

March 20, 1934, pursuant to above præcipe, judgment is hereby entered on the verdict.

IN UNITED STATES DISTRICT COURT

MOTION FOR RULE—Filed March 21, 1934

To the Honorable the Judges of said Court:

Now, March 21st, 1934, comes Leland W. Walker, attorney for Henry I. Rauch, Administrator, and respectfully represents:

[fol. 34] First. That the above proceedings were originally instituted in the Common Pleas Court of Somerset County and entered at No. 45 May Term, 1933 in said Court. Thereafter the said proceedings, for cause shown, were removed from the Common Pleas Court of Somerset County to the District Court of the United States at Pittsburgh; and thereafter on the 20th day of February, 1934, the said issue was tried before the Honorable Nelson McVicar Judge, and the jury, empaneled in said proceedings at the direction of Judge McVicar, directed the jury to return a verdict in favor of the plaintiff in the sum of Four Hundred Two and 08/100 ($402.08) Dollars, and which verdict has been duly entered in the records of your Honorable Court and reduced to judgment.

Second. Frequent demands have been made for the payment of the aforesaid judgment of Four Hundred Two and 08/100 ($402.08) Dollars, together with costs, but the defendant, R. G. Holsing, Receiver of the First National Bank of Boswell, Pennsylvania refuses to pay the whole thereof, but offers the Plaintiff the position of an unsecured creditor and the plaintiff refuses the said offer for the reason that the relation of debtor and creditor did not exist between his decedent and the First National Bank of Boswell, but alleges and says that the judgment obtained in these proceedings was ob*ob*tained on the allegations of bailor and

bailee, and an unlawful conversion by the bank of the decedent's liberty bonds, and demands payment in full, thereof.

Wherefore, the Plaintiff, through his attorney, Leland W. Walker, respectfully moves your Honorable Court to award [fol. 35] a rule upon R. G. Holsing, Receiver of the First National Bank of Boswell, to show cause why the said judgment should not be paid in full,

Respectfully moved, Leland W. Walker, Attorney for Henry I. Rauch, Administrator.

(Sworn to by Leland W. Walker.)

IN UNITED STATES DISTRICT COURT

ORDER GRANTING RULE

Now, March 21st 1934, on motion of Allen S. Christner, associated with Leland W. Walker, Attorney for Henry Rauch, Administrator, plaintiff in the foregoing proceedings, a Rule is awarded on R. G. Holsing, Receiver of the First National Bank of Boswell, to show cause why an order should not be entered directing the said Receiver to pay in full as a preferred item the verdict and resulting judgment therefrom of Four Hundred Two and 08/100 ($402.08) dollars, together with costs. Returnable 1st Monday of April, 1934.

By the Court, V.

IN UNITED STATES DISTRICT COURT

ANSWER TO RULE—Filed March 24, 1934

To the Honorable the Judges of said Court:

Now, March 22nd, 1934, comes R. G. Holsing, Receiver [fol. 36] above named, and in answer to the rule awarded by your Honorable Court 21st March, 1934, answering the averments of the petition says:

First. All of the averments in paragraph "First" are admitted, save the averment that the said verdict entered by the jury has been reduced to judgment of which fact this

respondent has never been advised and of which he has never had notice.

Second. The allegations of the "Second" paragraph are denied as therein averred. It is admitted that a demand was made of this respondent for the payment of a sum in excess of $402.08 which was refused for the reason that the said sum was in excess of the amount this respondent verily believes was the claim to which the plaintiff was entitled. It is true that this respondent has at all times been willing to concede and admit that the plaintiff is a common and unsecured creditor of the First National Bank of Boswell, Pa., now in the hands of your respondent as Receiver thereof, and entitled to a proper pro rata and proportionate dividend with other creditors of a like class of the assets of the said bank when and as the same are declared by the Comptroller of the Currency. It is denied that judgment was obtained on representations of the relationship of bailor and bailee and an unlawful conversion by the First National Bank of Boswell, Pa. of Liberty Bonds; and to the contrary, it is averred that upon certain admitted facts placed upon the record at the trial of the above cause in the District Court of the United States for the Western District of Pennsylvania, the Court directed the jury to return a verdict in favor of the plaintiff, but it is submitted that in none of said facts agreed upon or placed upon the record in accordance with the pleadings, was there any averment [fol. 37] or statement of the fact or law that the relationship between the plaintiff and the defendent as above named, now petitioner and respondent respectively, was that of bailor and bailee.

Third. For other and further answer, your petitioner avers that upon the facts stated upon the record, the District Court of the United States for the Western District of Pennsylvania, to No. 7545 Law, it conclusively appears that the general balance or assets of the First National Bank of Boswell, Pa. were neither increased nor diminished by reason of the transaction out of which the claim of the plaintiff arose, and that as a result thereof, the present petitioner is not entitled to have and receive a proportionate or distributive share or dividend of the assets of the said bank in full or in preference to those of the general creditors thereof; that upon the facts introduced before the

jury, upon which the Court directed a verdict to be rendered, the essential requirement that thereby an augmentation of the assets of the said bank arose or was created, is wholly lacking; and your Honorable Court cannot by this proceeding specifically decree and determine that the plaintiff is entitled to a preference over and above the general creditors of the said bank now in the hands of your respondent as Receiver.

Fourth. This respondent further avers that as he is advised by counsel and believes, your Honorable Court is without jurisdiction to proceed to enter any judgment, order or decree fixing the status of the present petitioner, plaintiff in the action entered to No. 7545 Law in this Court, as your Honorable Court has already after a full trial before a Court and Jury adjudicated the rights of plaintiff in the matter and a verdict has been rendered by a jury under the direction of the Court; and your respondent avers that any [fol. 38] proceedings in the nature of an order or decree based on such verdict, to make distribution of the assets of your respondent's trust—the First National Bank of Boswell, Pa., now insolvent—would be an attempt to take jurisdiction of an entirely independent and separate matter and to attempt to still further determine in the same action docketed to the same number in law, a matter now finally determined and concluded by your Honorable Court.

Fifth. This respondent further avers in answer to said petition that as he is advised by counsel and believes, even though an augmentation of the general assets of the bank had been shown, it becomes incumbent upon the claimant who desires or seeks to have his claim determined to be a preference and payable in full, to be able to trace the funds so augmenting the assets of the bank into a specific fund, or to trace the identical property, if unconverted, into the possession of the Receiver; and that it becomes the duty of the Court to make a decree in such case specifying particularly the assets to which such equitable lien attaches, and there are no facts before your Honorable Court in this proceeding, being the action in law docketed to the above number, upon which your Honorable Court could base such finding and make any such order or decree.

Sixth. Respondent further avers that as he is advised by counsel and believes, there is no jurisdiction in your Honor-

able Court to make an order and decree in conformity with the prayer of the petition as the power to order payment of a preferred claim has been placed entirely within the control of the Comptroller of the Currency by the Act of Congress providing therefor, and there is no Act of Congress or authority placing any power in the Courts to order the [fol. 39] payment of a preferred claim against an insolvent bank in the hands of a Receiver.

Seventh. This respondent further avers that as he is advised by counsel and believes, the averments in the petition are insufficient in form and in substance to confer jurisdiction upon your Honorable Court to make the decree prayed for therein.

Wherefore, the respondent respectfully prays that the rule may be dismissed at the cost of the petitioner.

And he will ever pray, etc.

R. G. Holsing, Receiver First National Bank of Boswell, Pa.

(Sworn to by R. G. Holsing.)

IN UNITED STATES DISTRICT COURT

OPINION—Filed January 10, 1935

McVICAR, J.:

Emiline B. Rauch, on the 21st day of January, 1932, had a special deposit in the First National Bank of Boswell, of four liberty bonds owned by her. On said date the bank, acting by its Cashier, sold said bonds to another customer of the bank without the knowledge or authority of Emiline B. Rauch, and on the same day delivered said bonds to said customer and received payment therefor. On the 26th day of Janu ry 1932, the said bank was declared by the Comptroller of the Currency to be insolvent and closed, and a [fol. 40] Receiver was appointed. Before the closing of the bank, the bank, by its Cashier, endeavored to purchase four liberty bonds of the same character and amount for Mrs. Rauch and had issued its check in payment of said bonds but the bank closed before said check was paid and said bonds were not delivered. Mrs. Rauch afterwards died and an action at law was brought to recover the value of said bonds against the Receiver of the bank which resulted in a

verdict in favor of the plaintiff in the sum of $402.08, upon which judgment was entered. Plaintiff since filed a motion in this Court wherein he prayed that an order be made directing the defendant to pay the amount of said judgment to him. A rule was granted and at the hearing of the rule the parties, acting through their attorneys, agreed that the facts were substantially as stated above and that this case might be disposed of upon the pleadings now before the Court.

Plaintiff claims that he is a preferred creditor. Defendant denies this averment and claims that there was no augmentation of the assets of the defendant bank by the transaction aforesaid.

I am of the opinion that the deposit aforesaid was a special deposit; that the assets of the bank were augmented when the bank received from its customer the price agreed upon for said bonds and, therefore, that the plaintiff is entitled to participate in the distribution of the assets of the defendant bank as a preferred creditor. I also am of the opinion that the plaintiff is not entitled to have an order made directing payment of the amount of the judgment aforesaid to him.

[fol. 41] Let an order or decree be prepared and submitted in accordance with this opinion.

IN UNITED STATES DISTRICT COURT

DECREE—Filed January 17, 1935

Now, January 17, 1935, it is hereby Ordered, Adjudged and Decreed that the judgment recovered in this Court in these proceedings, wherein the Administrators of Emiline Rauch are plaintiffs and the Receiver of the First National Bank is defendant in the amount of Four Hundred Two and 08/100 — ($402.08) is founded on facts and circumstances, having all the attributes of a special deposit and as such special deposit is entitled to participate in the distribution of the assets by the Receiver of the First National Bank of Boswell as a preferred creditor.

By the Court.

Exception to defendant granted.

N. McVicar, D. J.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed May 7, 1935

To the Honorable the Judges of Said Court:

R. G. Holsing, Receiver of the First National Bank of Boswell, Pennsylvania, defendant in the above styled cause, believing himself aggrieved by the decree entered on the [fol. 42] 17th day of January, 1935 in the above styled cause, does hereby appeal therefrom to the Circuit Court of Appeals for the Third Circuit for the reasons specified in the Assignments of Error which shall be filed herewith; and he prays that this Appeal may be allowed and that a citation be issued directed to the said Henry I. Rauch, Administrator of Emiline B. Rauch, plaintiff, commanding him to appear before the Circuit Court of Appeals for the Third Circuit, to do and receive what may appertain to justice to be done in the premises; that a transcript of the record, proceedings and papers upon which said decree was made by duly authenticated and sent to the Circuit Court of Appeals for the Third Circuit, and that a proper order relating to the security required of him to perfect his appeal may be made.

R. G. Holsing, Receiver of the First National Bank of Boswell, Pa., by Clarence L. Shaver, His Solicitor.

(Sworn to by Clarence L. Shaver.)

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

Now, 7th day of March, 1935, appeal allowed; and it is ordered that a citation be issued admonishing the plaintiff to be and appear in the United States Circuit Court of Appeals for the Third Circuit, on or before thirty days from this date. No bond will be required—Pacific Bank vs. Mixler 114 U. S. 463; Schell vs. Cochran, 107 U. S. 625-628.

By the Court.

N. McVicar, Judge.

[fol. 43] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed May 7, 1935

R. G. Holsing, Receiver of the First National Bank of Boswell, Pennsylvania, avers the following reasons in support of his appeal as Receiver of said Bank to the United States Circuit Court of Appeals for the Third Circuit:

I

The lower Court erred in the opinion filed by Nelson McVicar, Judge of said Court, on the 10th day of January, 1935, wherein the Court said:

"I am of the opinion that the deposit aforesaid was a special deposit; that the assets of the bank were augmented when the bank received from its customer the price agreed upon for said bonds and, therefore, that the plaintiff is entitled to participate in the distribution of the funds of the defendant bank as a preferred creditor."

Exceptions

Exception to defendant granted,

N. McVicar, P. J. (Seal.)

II

The court erred in entering the following final decree:

"Now, January 17th, 1935, it is hereby Ordered, Adjudged and Decreed that the judgment recovered in this Court in these proceedings, wherein the Administrator of Emiline Rauch are plaintiffs and the Receiver of the First National Bank is defendant in the amount of Four Hundred Two and 08/100 — ($402.08) is founded on facts circum-
[fol. 44] stances, having all the attributes of a special deposit and as such special deposit is entitled to participate in the distribution of the assets by the Receiver of the First National Bank of Boswell as a preferred creditor.

By the Court, V.

Exceptions

"Now, 17th day of January 1935, exception granted to the defendant and bill sealed.

Nelson McVicar, D. J. (Seal.)

In United States District Court

Præcipe for Record—Filed March 7, 1935

To the Clerk of the United States District Court for the Above Named District:

Please include in the Record of the above case for review of the same by the Circuit Court of Appeals the following:

Docket Entries in Common Pleas Court of Somerset County and the Docket Entries of the District Court for the Western District of Pennsylvania.

Plaintiff's Statement of Claim.

Petition to remove cause to District Court and Order thereon.

Affidavit of Defense.

Transcript of Proceedings.

[fol. 45] Verdict of the Jury.

Judgment on the Verdict.

Motion for Rule and Answer thereto.

Opinion of the District Court.

Decree of the District Court and exceptions thereto.

and deliver the above record to me at the following address: Clarence L. Shaver, Attorney for R. G. Holsing, Receiver, Appellant, Somerset, Pa.

Clarence L. Shaver.

March 6th, 1935.

In United States District Court

Motion to Amend Record—Filed July 22, 1935

And Now, July 19, 1935, the court is respectfully moved to amend the record in the above case, so that the title of the case shall read: "Henry I. Rauch, Administrator, Emi-

line R. Rauch, late of Jenner Township, Somerset County, Pennsylvania, vs. Park L. Hoffman, substituted for R. G. Holsing, Receiver of First National Bank of Boswell, Pennsylvania," said R. G. Holsing having resigned as Receiver and Park L. Hoffman having been appointed in his stead by the Comptroller of the Currency of the United States, as [fol. 46] appears by a certified copy of his appointment which is hereto attached.

Joseph Levy, Attorney for Defendant.

July 22nd, 1935, amendment allowed.

R. M. Gibson, District Judge.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 47] In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1935

No. 5798

Park L. Hoffman, Substituted for R. G. Holsing, Receiver of First National Bank of Boswell, Pa., Appellant,

vs.

Henry I. Rauch, Administrator, Emiline B. Rauch, Appellee

And afterwards, to wit, the 7th day of October, 1935, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 9th day of October, 1936, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 48] In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1935

No. 5798

Park L. Hoffman, Substituted for R. G. Holsing, Receiver of First National Bank of Boswell, Pennsylvania, Appellant,

v.

Henry I. Rauch, Administrator, Emiline B. Rauch, Late of Jenner Township, Somerset County, Pennsylvania, Appellee

Appeal from the District Court of the United States for the Western District of Pennsylvania

Opinion—Filed October 9, 1936

Before Buffington, Davis and Thompson, Circuit Judges

Davis, Circuit Judge:

This is an appeal from a judgment of the District Court, holding the bank liable for the purchase price of four bonds

left with the bank "for safe keeping only" under the following circumstances.

On July 10, 1922, Emiline B. Rauch left with the Peoples State Bank of Boswell five United States Liberty Bonds [fol. 49] of the value of $100 each "for safe keeping only" for which the bank gave her a receipt.

On April 9, 1929, with the approval of the Comptroller of the Currency and the Department of Banking of Pennsylvania, the First National Bank of Boswell purchased all the property and assets of every kind of the Peoples State Bank and on the same day the bonds of Mrs. Rauch, along with other property were delivered by the State Bank to the National Bank. Thereafter the National Bank held the same relation to the bonds as had the State Bank.

The last time that Mrs. Rauch saw the bonds was on September 29, 1931. She presumably had gone to the bank from time to time to cut coupons from them.

On January 21, 1932, the cashier of the First National Bank without the consent or even the knowledge of Mrs. Rauch, or her legal representative, sold four of the bonds to Josiah and Rose Lohr, customers and depositors of the bank, and charged their account with the purchase price of $400.24. On the following day the cashier drew his check payable to the order of Post & Flagg, brokers, for $402.08 for the purchase of four similar bonds to take the place of the bonds of Mrs. Rauch which he had sold, but on January 26, 1932, before the check was presented for payment, the bank was found to be insolvent and its business was suspended. Mr. R. G. Holsing was appointed receiver of the bank by the Comptroller of the Currency. He later resigned as receiver and Mr. Park L. Hoffman, appellant, was appointed in his place. The check has never been paid.

Mrs. Rauch died January 2, 1932, nineteen days before the cashier sold the bonds, and this suit was brought by the administrator of her estate to recover the purchase price of the bonds. The case was tried to the court and jury and at its conclusion the court directed a verdict for the plain- [fol. 50] tiff for $402.08. A motion for a new trial was refused. Judgment was entered on the directed verdict and the case is here on appeal from that judgment.

The plaintiff contends that the deposit of these bonds created an express trust and augmented the assets of the bank.

The defendant on the other hand contends that the mere leaving of the bonds with the bank did not create a trust, either express or implied, but if it did, the conversion of the bonds was only a breach of the trust, and when the proceeds of their sale went into, and were commingled with, the general funds of the bank where they could not be traced to any special fund or specifically identified, the owner was not entitled to a preference over the general creditors of the bank; and that, as the transfer of the funds from the account of the purchaser of the bonds to the general fund of the bank was a mere bookkeep' transaction and no money was actually paid in to increase the assets of the bank, the owner in consequence was not entitled to a preference.

The learned District Judge rejected the contention of the receiver of the bank and held that the deposit was a special deposit which augmented the assets of the bank when it received the price of the bonds from its customer and entitled the owner to a preference.

The receiver says that it is necessary for the appellee to establish the following three things before he can recover:

"(1) that the bank received the property in a fiduciary capacity; (2) that the property actually augmented the existing assets, as distinguished from a mere bookkeeping credit; and (3) that the fund is traceable as an identifiable res in the hands of the receiver."

He relies upon the following cases to support his contention: National City Bank v. Hotchkiss, 231 U. S. 50; Schuy-[fol. 51] ler v. Littlefield, 232 U. S. 707; Cunningham, Trustee of Ponzi v. Brown, 265 U. S. 1; St. Louis & San Francisco R. R. Co., et al. v. Spiller, et al., 274 U. S. 304. But these cases when correctly interpreted, do not support his position. In the Hotchkiss case, a loan was made by the bank to a customer and the money was placed to his credit in a general account to be used in taking up certain securities. The bank closed, and it was held that when the funds entered the stream of the bank's general property, it could no longer be identified and the depositor had to share with other general creditors on a pro rata basis. There was here a pure relation of debtor and creditor between the bank and the depositor. In the case of Cunningham, trustee, etc. v. Brown, Ponzi advertised widely for the loan of money and promised to return the money with

large interest at any time the lender desired it. The money thus received was deposited in a bank in a general fund. When this fund was depleted, it was replenished by other money secured in the same way. When the Ponzi bubble burst, certain people who had loaned money to Ponzi tried to get their money from the bank on the ground that they had elected to rescind the contract with Ponzi on the ground of fraud. The court said that they had two remedies which they could have pursued for the recovery of their money: They could have followed the money wherever they could trace it and could have asserted the right of possession to it on the ground of a resulting trust in their favor, or they could have established a lien for what was due them in any particular fund of which he had made it a part. They did not do either and consequently failed. The receiver further cited Jennings v. United States Fidelity & Guaranty Co., 294 U. S. 216; Old Company's Lehigh v. Meeker, 294 U. S. 227; Adams v. Champion, 294 U. S. 231 and many others, but in all of them there existed the [fol. 52] relation of debtor and creditor between the bank and the depositor which distinguishes them from the case at bar.

Mrs. Rauch simply left the bonds with the bank "for safe keeping only". The bank was the mere custodian of the bonds, and title to them never passed to the bank. Mrs. Rauch or the administrator of her estate had the right to follow them in the original, or in some other substituted form. The right of the administrator to pursue the bonds or the money into which they had been converted into the hands of the receiver of the bank, depends upon the fact that title to the bonds or the money representing them was in the administrator and not upon the relation of debtor and creditor, or upon the ground of a debt due and owing, Cox v. St. Anthony Bank & T. Co., 41 Idaho, 776; Windstanley v. Second Nat. Bank, 13 Ind. App. 544; Andrew v. State Bank, 205 Iowa, 1064, or of compensation for the loss of property, Myers v. Matusek, 98 Fla. 1126; Daughtry v. International Bank, 18 N. M. 119, or on the ground of unlawful conversion of property, Hanover Nat. Bank v. Thomas, 217 Ala. 494; Holbrook Irrig. Dist. v. First State Bank, 84 Colo. 157. Title never passed to the bank. The administrator is merely seeking to recover his own property or the proceeds thereof and it is the duty of the court to lend its aid to the owner in reclaiming his prop-

erty. Macy v. Roedenbeck, 227 Fed. 346, 353, 356. In that case Judge Elliott, speaking for the Circuit Court of Appeals for the Eighth Circuit, said:

"Under the earlier rule petitioner would have been required to identify it (the property in question) as the very property which he had confided to another. The modern and more equitable doctrine permits the recovery of a trust fund from one not an innocent purchaser, and into any shape into which it may have been transmuted, provided [fol. 53] he can establish the fact that it is his property, or the proceeds of his property, or that his property has gone into it and remains in a mass from which it cannot be distinguished. Spokane County v. First National Bank of Spokane et al., 68 Fed. 979, 982.

"This more recent doctrine follows the rule announced in Re Hallett's Estate (Knatchbull v. Hallett) 13 Ch. Div. 696, which is to the effect that, if money held by one in a fiduciary character has been paid by him to his account at his bank, the person for whom he held the money can follow it and has a charge on the balance in the banker's hands, and that if the depositor has commingled it with his own funds in the bank, and afterwards drawn out sums upon checks in the ordinary manner, he must be held to have drawn out his money in preference to the trust money, and if he destroyed the trust fund by dissipating it altogether, there remains nothing to be the subject of the trust; that only so long as the trust property can be traced and followed into other property into which it has been converted, does it remain subject to the trust."

Judge Elliott cited many cases, both federal and state, sustaining this doctrine. There is no question about the facts in this case nor about the fact that the bonds were sold and that the proceeds went into the funds of the bank where they still remain in the possession of the receiver.

With the District Judge, we think that the proceeds of these bonds augmented the assets of the bank. They certainly reduced its liability to others.

The administrator is entitled to recover them and the judgment of the District Court is affirmed.

A true Copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 54] In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1935

No. 5798

Park L. Hoffman, Substituted for R. G. Holsing, Receiver of First National Bank of Boswell, Pa., Appellant,

vs.

Henry I. Rauch, Admr., etc., Appellee

On Appeal from the District Court of the United States, for the Western District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, October 9, 1936.

J. Warren Davis, Circuit Judge.

Endorsements: Order Affirming Judgment. Received & Filed Oct. 9, 1936. Wm. P. Rowland, Clerk.

[fol. 55] United States of America,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this Court in the case of Park L. Hoffman, Substituted for R. G. Holsing, Receiver of 1st National Bank of Boswell, Pa., Appellant, vs. Henry I. Rauch, Administrator, Emiline B. Rauch, etc., Appellee, No. 5798 on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 17th day of November, in the year of our Lord one thousand nine hundred and thirty-six, and of the Independence of the United States the one hundred and sixty-first.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal United States Circuit Court of Appeals, Third Circuit.)

[fol. 56] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter George P. Barse. File No. 41,103. U. S. Circuit Court of Appeals, Third Circuit. Term No. 563. Park L. Hoffman, Substituted for R. G. Holsing, Receiver of First National Bank of Boswell, Pennsylvania, petitioner, vs. Henry I. Rauch, Administrator, Emiline B. Rauch, Late of Jenner Township, Somerset County, Pennsylvania. Petition for a writ of certiorari and exhibit thereto. Filed December 8, 1936. Term No. 563, O. T., 1936.

FILE COPY

FILED
DEC 8 1936
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 563

PARK L. HOFFMAN, substituted for R. G. HOLSING, Receiver of First National Bank of Boswell, Pennsylvania, *Petitioner*,

v.

HENRY I. RAUCH, Administrator, EMILINE B. RAUCH, late of Jenner Township, Somerset County, Pennsylvania, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN F. ANDERSON,
JOSEPH LEVY,
Attorneys for Petitioner.

GEORGE P. BARSE,
Attorney for the Comptroller of the Currency, of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Petition	1
Summary of Matters Involved	2
Reasons Relied on for Allowance of Writ	3
I. Opinions of Courts Below	5
II. Jurisdiction	5
III. Statement of the Case	6
IV. Specification of Errors	6
V. Argument	6
Conclusion	10
Appendix	11

CITATIONS.

Adams v. Champion, 294 U. S. 232	3, 4, 8
Atlantic Theatre Co. v. Faircloth, Receiver, Chelsea-Second National Bank	4
Blakey v. Brinson, 286 U. S. 254	3, 4, 7
City Bank v. Blackmore, 75 Fed. 771	9
Cook County National Bank v. United States, 107 U. S. 445	3, 6
First National Bank of St. Petersburg v. Miami, 69 Fed. (2nd) 346	10
Gwynn v. Spurway, 28 Fed. (2nd) 37	10
Jennings v. U. S. F. & G. Co., 294 U. S. 216	3, 4, 7, 8, 9
Marchant v. Summers, 79 Fed. (2nd) 877	10
Old Company's Lehigh v. Meeker, 294 U. S. 227	3, 8
Steuber v. O'Keefe, 16 Fed. Supp. 97	4
Texas & Pacific Railway Co. v. Pottorff, 291 U. S. 245	3, 7

STATUTES.

5236 U. S. R. S.	6
12 U. S. C. A. 194	6
28 U. S. C. A. 347	6
Judicial Code, Sec. 240(a)	6
Appendix	11
American Law Institute, Restatement of Law of Trusts, Sec. 74-c and Sec. 87	7
Legal Problems in Transmission of Funds, Columbia Law Review, June 1921	7

Supreme Court of the United States

OCTOBER TERM, 1936.

No.

PARK L. HOFFMAN, substituted for R. G. HOLSING, Receiver of First National Bank of Boswell, Pennsylvania, *Petitioner,*

v.

HENRY I. RAUCH, Administrator, EMILINE B. RAUCH, late of Jenner Township, Somerset County, Pennsylvania, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Park L. Hoffman, as Receiver of the First National Bank of Boswell, Pennsylvania, by direction of the Comptroller of the Currency, respectfully prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Third Circuit in the above captioned cause entered October 9, 1936, unreported but printed in the record, page 52.

I.

Summary of Matters Involved.

A trust has been impressed on the assets of a National bank in the hands of a Receiver for the proceeds of bonds held in safekeeping for one customer and sold by the bank five days prior to suspension to another customer, apparently without intent to defraud, in that substitute bonds were immediately ordered by the bank (R. 29-30). The record establishes that the sale proceeds consisted only of bookkeeping entries in the form of a charge against a general deposit account in the same bank. The question is whether the trust may be upheld.

The facts are not in controversy. The First National Bank of Boswell, Pennsylvania, was declared insolvent on January 26, 1932, and a Receiver was appointed by the Comptroller of the Currency (R. 13). On January 21, 1932 the bank's cashier sold four Liberty bonds of the par value of $400, held by it in safekeeping for Emiline B. Rauch, to Josiah or Rose Lohr, depositors of said bank and charged their account with the sum of $400.24 as the purchase price of said bonds (R. 29). On the next day the bank's cashier mailed its check in the amount of $402.08 to a broker for the purchase of four similar bonds but the purchase was not completed prior to the bank's suspension (R. 29, 30). The Receiver offered the respondent a general claim in the amount of $402.08 which was rejected (R. 30). The respondent-plaintiff sued at law (R. 4) and the District Court directed the jury to find for the plaintiff in the amount of $402.08 (R. 31). Thereafter, in the same proceeding, on motion for rule (R. 33), and answer (R. 35) wherein the Receiver denied that the assets that passed to him had been augmented by the transaction or that the proceeds were traceable into such assets, the District Court allowed the plaintiff a preferred claim in the amount of $402.08 against all of the assets that passed to the Receiver (R. 39-41). The District Court's decree was affirmed by the Circuit Court of Appeals (R. 52).

The petitioner contends that under the record facts and the decisions of this Honorable Court no trust can be impressed on the assets that passed into his hands because those assets were not augmented when the bank surrendered possession of the respondent's bonds prior to suspension and that consequently no proceeds of the sale can be traced to the Receiver.

II.

Reasons Relied on for Allowance of Writ.

Petitioner believes that the writ of certiorari should be granted because:

(a) The decision of the Circuit Court of Appeals, impressing a trust on the assets that passed to the bank Receiver despite record proof that those assets were not augmented by the bank's sale of the respondent's bonds, is in conflict with the principles applied by this Honorable Court in *Adams* v. *Champion*, 294 U. S. 232, 239; *Jennings* v. *U. S. F. & G. Co.*, 294 U. S. 216, 222; *Old Company's Lehigh* v. *Meeker*, 294 U. S. 227, 229; *Texas & Pacific Railway Co.* v. *Pottorff*, 291 U. S. 245, 261 note 19 and *Blakey* v. *Brinson*, 286 U. S. 254, 263.

(b) The Circuit Court of Appeals has rendered a decision in conflict with the decisions of other Circuit Courts of Appeal on the same matter. The large number of bank failures in recent years has greatly increased the number of trust claims asserted by persons seeking to avoid the pro rata distribution. As a result, scores of actions involving such claims have been decided by District Courts and Circuit Courts of Appeal which now hold uniformly that to prevail the claimant must establish a trust relationship, augmentation of the bank's assets, and tracing of the proceeds to the Receiver. The National Bank Act contemplates a uniform system for winding up the affairs of insolvent National banks (*Cook County National Bank* v. *United States*, 107 U. S. 445) and this court has recognized

the importance of uniformity in this class of cases by granting reviews and reversing the Appellate Courts in *Jennings* v. *U. S. F. & G. Co.*, *Adams* v. *Champion and Blakey* v. *Brinson, supra.* The decision of the Circuit Court of Appeals in the instant case is now the only Appellate Court decision in conflict with the settled Federal rule. The class importance of the decision of the court below is already evidenced by the fact that it is the principal authority relied on in a brief recently filed with Judge Avis, United States District Court, District of New Jersey, by the plaintiff in *Atlantic City Theatre Co.* v. *Faircloth, Receiver of the Chelsea-Second National Bank,* where, as in the instant case, neither augmentation nor tracing appear. Shall Judge Avis apply the rule of the instant case, or shall he apply the settled Federal rule he has consistently followed in these cases, his last decision being in *Steuber* v. *O'Keefe,* 16 Fed. Supp. 97 (Adv. Sh.).

(c) The Circuit Court of Appeals has decided an important question of general law in a way probably untenable and in conflict with the weight of authority.

WHEREFORE, it is respectfully prayed that this petition for writ of certiorari be granted.

JOHN F. ANDERSON,
JOSEPH LEVY,
Attorneys for Petitioner.

GEORGE P. BARSE,
Attorney for the Comptroller of the Currency, of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1936.

No.

PARK L. HOFFMAN, substituted for R. G. HOLSING, Receiver of First National Bank of Boswell, Pennsylvania, *Petitioner*,

v.

HENRY I. RAUCH, Administrator, EMILINE B. RAUCH, late of Jenner Township, Somerset County, Pennsylvania, *Respondent*.

BRIEF IN SUPPORT OF PETITION.

I.

Opinions of Courts Below.

The opinion and decree of the District Court are set out in the Record at pages 39 and 41 and are not reported. The opinion of the Circuit Court of Appeals for the Third Circuit is found in the Record at page 47 and is not yet reported.

II.

JURISDICTION.

The decree of the Circuit Court of Appeals to be reviewed was entered October 9, 1936 (R. 52). Jurisdiction

is conferred upon this Court to review this cause by writ of certiorari under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. Title 28, Section 347).

III.

Statement of the Case.

A statement of the case is set forth in the foregoing petition under the caption "Summary of Matters Involved", to which reference is here made.

IV.

Specification of Errors.

The Appellate Court erred in holding that the proceeds received for the bonds when sold augmented the assets of the bank.

The Appellate Court erred in impressing a trust in any amount on the assets that passed to the Receiver.

The Appellate Court erred in not requiring the respondent to participate in the pro rata distribution provided by the National Bank Act.

V.

Argument.

Section 5236 U. S. R. S. (12 U. S. C. Ch. 2, Sec. 194) (App. p. 11) "provides for a distribution of the entire assets of the bank, giving no preference to any claim except for moneys to reimburse the United States for advances in redeeming the notes." *Cook County National Bank* v. *United States*, 107 U. S. 445, 450. With this exception even the United States must participate in the pro rata distribution unless it has taken the security provided by law.

The respondent can avoid participation in the pro rata distribution only upon affirmative proof that the bank held the decedent's property in trust and that this property in

its original or changed form passed into the hands of the Receiver. As stated by this court in *Texas & Pacific Railway Co.* v. *Pottorff*, 291 U. S. 245, 261, Note 19:

> "The claimant has the burden of identifying the property in its original or altered form. Schuyler v. Littlefield, 232 U. S. 707. It is not enough to show that at the time of receipt the general assets of the insolvent were increased or that debts were discharged. Wuerpel v. Trust Co., 238 Fed. 269, 272, 3; Knauth v. Knight, 255 Fed. 677; State Bank of Winfield v. Alva Security Bank, 232 Fed. 847; In re See, 209 Fed. 172; In re Dorr, 196 Fed. 292; City Bank v. Blackmore, 75 Fed. 771; compare Railway v. Spiller, 274 U. S. 304, 311; Cunningham v. Brown, 265 U. S. 1."

The record establishes that the bank held the decedent's bonds as bailee but sold and surrendered them five days prior to its suspension in exchange for a general credit balance already on its books, accomplished by bookkeeping entries only. When the bank surrendered the bonds it no longer held anything in trust but had a mere personal liability to the beneficiary for a breach of trust. "An obligor cannot be trustee either of his duties or of the obligee's rights under the obligation." American Law Institute, Restatement of the Law of Trusts, Sections 74-c and 87. "The cancellation of the credit balance by the debit neither suggests any intention to establish a trust nor points to any identifiable thing which could be the subject of it." *Blakey* v. *Brinson*, 286 U. S. 254, 263. "The very essence of the right of priority over other creditors depends upon the setting apart of a particular fund for the benefit of the depositor. There is no basis for giving one depositor a priority over another unless this is an essential part of the transaction." Mr. Justice Stone, "Legal Problems in the Transmission of funds." Columbia Law Review June 1921. Page 525.

In its opinion (R. 50) the court below refers to this court's recent decisions in *Jennings* v. *U. S. F. & G. Co.*,

supra, Old Company's Lehigh v. *Meeker, supra,* and *Adams* v. *Champion, supra,* and states "but in all of them there existed the relation of debtor and creditor between the bank and the depositor which distinguishes them from the case at bar." We submit that this statement is incorrect when applied to the claim based on the Veesaert bonds in *Adams* v. *Champion* and that this court's disposition of that claim conclusively classifies the claim in the instant case as general only.

This court held that the Veesaert bonds were held by the bank in trust, which is also true of the instant case and in both cases the bonds were disposed of prior to the bank's suspension. In *Adams* v. *Champion* the bank received for the bonds a solvent credit in the amount of $1597.31 with a Chicago bank, but as only $776.57 was admittedly traced to the Receiver this court denied the trust sought to be impressed for the remainder of $820.74 (p. 239). In the instant case the bank received nothing but a transfer of bookkeeping credits in exchange for the bonds, consequently the entire trust claim should have been denied for failure to prove either augmentation or tracing of funds.

The basis for the error of the courts below is indicated by the language of the Appellate Court's opinion (R. 51) "With the District Judge we think that the proceeds of these bonds augmented the assets of the bank. They certainly reduced its liabilities to others." But it is settled, in the Federal courts, that a reduction of the bank's liabilities to others is not sufficient to create a trust against the assets that passed to the Receiver and this court said in this connection in *Jennings* v. *U. S. F. & G. Co., supra* at pages 224, 225:

> "But the situation is very different when what has been received by the collecting agent is not a thing at all, but a reduction of liabilities by set-off or release. Blakey v. Brinson, supra; People v. Merchants & Mechanics Bank, 78 N. Y. 269, 272, 273; Hecker-Jones-Jewell Milling Co. v. Cosmopolitan Trust Company,

supra, p. 187; City Bank v. Blackmore, 75 Fed. 771; Anheuser-Busch Brewing Association v. Clayton, 56 Fed. 759; Farmers National Bank v. Pribble, 15 Fed. (2nd) 175, 176; Dickson v. First National Bank, 26 Fed. (2nd) 411; Schilling v. Rowe, 64 F. (2nd) 188, 190; Allied Mills v. Horton, 65 Fed. (2nd) 708, 710; Smith v. Zemurray, 69 F. (2nd) 5, 6, 7; First National Bank of St. Petersburg v. Miami, 69 Fed. (2nd) 346; Wisdom v. Keen, 69 Fed. (2nd) 349. A debt does not furnish a continuum upon which a trust can be imposed after cancellation or extinguishment has put the debt out of existence.

The truth of this statement, though obvious enough upon its face, finds point and confirmation when the benefit, if any, accruing to the debtor is viewed as of the time of insolvency or later. What was done by the collecting bank through a settlement in the clearing house has not increased the assets available for distribution in the hands of the receiver. What was done through that settlement has had no effect after insolvency except to diminish liabilities. *The dividend that would be due upon the debts canceled through the set-off if they were now to be revived is the measure of any benefit accruing to the creditors. Decisions of other courts, to the extent that they give support for a different conclusion are built, as we think, upon an inadequate analysis, and do not win our approval.* It is the benefit to the creditors, not the loss to the respondent, that marks the gain to the fund now held by the receiver. If the respondent is permitted to prove against the assets on a parity with other creditors, the share thus allotted will correspond accurately to whatever accretion has resulted from the act of set-off and cancellation in the operations of the clearing house." (Italics ours.)

We can cite many decisions of the Circuit Courts of Appeal in conflict with the decision of the court below but believe it sufficient to refer to those listed at page 224 of this court's opinion in *Jennings* v. *U. S. F. & G. Co., supra,* which include *City Bank* v. *Blackmore* (C. C. A. 6), 75 Fed. 771, opinion by the then Circuit Judge Taft, and *First Na-*

tional Bank of St. Petersburg v. *Miami* (C. C. A. 5) 69 Fed. (2nd) 346, wherein the Circuit Court of Appeals reversed its prior decision reported in 58 Fed. (2nd) 561, after twice certifying the question to this court. The most recent of these Liberty bond cases is *Marchant* v. *Summers* (C. C. A. 4) 79 Fed. (2nd) 877, which cites *Gwynn* v. *Spurway*, 28 Fed. (2nd) 37, in both of which a trust is impressed because, *unlike the instant case*, the proceeds were traceable to the Receiver.

VI.

Conclusion.

It is believed that the foregoing discussion and citation of authorities demonstrates that the decision of the court below is erroneous and it is earnestly urged in the interest of uniformity of decisions applicable to the administration of insolvent National banks throughout all the States that this Honorable Court entertain a review of this case on writ of certiorari.

Respectfully submitted,

JOHN F. ANDERSON,
JOSEPH LEVY,
Attorneys for Petitioner.

GEORGE P. BARSE,
Attorney for the Comptroller of the Currency, of Counsel.

APPENDIX.

Title 12 U. S. C. A., Sec. 194.

DIVIDENDS ON ADJUSTED CLAIMS; DISTRIBUTION OF ASSETS. From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held. (R. S. 5236.)

FILE COPY

FEB 5 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 563.

PARK L. HOFFMAN, Substituted for R. G. Holsing, Receiver of FIRST NATIONAL BANK OF BOSWELL, Pennsylvania, *Petitioner,*

v.

HENRY I. RAUCH, Administrator, EMILINE B. RAUCH, late of Jenner Township, Somerset County, Pennsylvania, *Respondent.*

BRIEF OF PETITIONER.

GEORGE P. BARSE,
JOHN F. ANDERSON,
Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

Subject Index.

	Page
I. Opinions Below	1
II. Jurisdiction	2
III. Statement of the Case	2
IV. Specification of Errors	3
V. Summary of Argument	4
VI. Argument	4
VII. Conclusion	11
Appendix	12

CASES CITED.

Adams v. Champion, 294 U. S. 231	5
Blakey v. Brinson, 286 U. S. 254, 263	5
Cook County National Bank v. United States, 107 U. S. 445, 450	4
Gwynn v. Spurway, 28 Fed. (2nd) 37	9
Jennings v. U. S. F. & G. Co., 294 U. S. 216, 224, 225	6
Kohler v. Spurway, 28 Fed. (2nd) 36	8
Marchant v. Summers, 79 Fed. (2nd) 877	8
Old Company's Lehigh v. Meeker, 294 U. S. 227, 230	10
O'Neal v. White, 79 Fed. (2nd) 835, certiorari denied 297 U. S. 706	8
Texas & Pacific Railway v. Pottorff, 291 U. S. 245, 261, note 19	5, 6

STATUTES.

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. Title 28, Section 347)	2
Section 5236 U. S. R. S. (U. S. C. Title 12, Ch. 2, Sec. 194)	4
Columbia Law Review, June 1921, Page 525	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 563.

PARK L. HOFFMAN, Substituted for R. G. Holsing, Receiver of FIRST NATIONAL BANK OF BOSWELL, Pennsylvania, *Petitioner,*

v.

HENRY I. RAUCH, Administrator, EMILINE B. RAUCH, late of Jenner Township, Somerset County, Pennsylvania, *Respondent.*

BRIEF OF PETITIONER.

I.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Third Circuit (Davis, Circuit Judge) is reported in 85 Fed. (2nd) 1000 and appears in the record at page 33. The opinion and decree of the District Court are set out in the record at pages 27 and 28 and are unreported.

II.

Jurisdiction.

An order allowing the petition for a writ of certiorari was granted by this court on January 11, 1937 (R. 39) under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. Title 28, Section 347).

III.

Statement of the Case.

A trust has been impressed on the assets of a National bank in the hands of a Receiver for the proceeds of bonds held in safekeeping for one customer and sold by the bank five days prior to suspension to another customer, apparently without intent to defraud, in that substitute bonds were immediately ordered by the bank. The record establishes that the sale proceeds consisted only of bookkeeping entries in the form of a charge against a general deposit acccount in the same bank. The question is whether the trust may be upheld.

There is no material contradiction as to the facts. The First National Bank of Boswell, Pennsylvania, was declared insolvent on January 26, 1932 (R. 9, 27) and a Receiver was appointed by the Comptroller of the Currency on February 9, 1932 (R. 6). On January 21, 1932 the bank's cashier sold four Liberty bonds of the total par value of $400 held by it in safekeeping for Mrs. Emiline B. Rauch, to Josiah or Rose Lohr, depositors of said bank and charged their account with the sum of $400.24 as the purchase price of said bonds (R. 20). On the next day the bank's cashier mailed its check in the amount of $402.08 to a broker for the purchase of four similar bonds but the purchase was not completed prior to the bank's suspension (R. 20). Mrs. Rauch died June 2, 1932 (R. 3, 17, 27) and not "January 2, 1932, nineteen days before the cashier sold the bonds", as inadvertently stated in the opinion below (R.

34) and the respondent is the administrator of her estate (R. 3). The Receiver offered the respondent a general claim in the amount of $402.08 which was rejected (R. 21 and 25). The respondent then sued the Receiver at law in the Court of Common Pleas of Somerset County, Pennsylvania (R. 3) and the Receiver removed the case to the United States District Court for the Western District of Pennsylvania (R. 7) which instructed the jury to render a verdict for the respondent in the sum of $402.08 (R. 21). Thereafter, in the same proceeding, on motion for rule (R. 23) and the Receiver's answer thereto (R. 24) wherein he denied (1) that the bank's assets were augmented, (2) that the proceeds are traceable to the Receiver and (3) that the respondent is entitled to any priority over general creditors, the District Court allowed the respondent a "preferred creditor" claim in the amount of $402.08 against all of the assets that passed to the Receiver (R. 27, 28). The District Court's judgment was affirmed by the Circuit Court of Appeals (R. 38).

IV.

Specification of Errors.

(a) The Circuit Court of Appeals erred in holding that the assets of the bank were augmented by the sale of the decedent's bonds. The record establishes that the bank received no new money but merely a transfer of bookkeeping credits already on its books, incident to their sale and surrender.

(b) The Circuit Court of Appeals erred in holding that the proceeds from the bank's sale of the decedent's bonds are traceable into the hands of the Receiver.

(c) The Circuit Court of Appeals erred in impressing a trust in any amount on the assets that passed to the Receiver.

(d) The Circuit Court of Appeals erred in not requiring the respondent to participate in the pro rata distribution provided by the National Bank Act.

V.

Summary of Argument.

Where, as in the instant case, a claimant seeks to recover from the Receiver of an insolvent National bank, money or property alleged to have been held by the bank on a trust he must affirmatively establish, under the settled Federal rule: (1) that the transactions with the bank relied upon by the claimant resulted in a trust relationship between the bank and claimant (2) that the assets of the bank were augmented or increased by new cash or property accruing from said transactions, and (3) that said new property, in its original or changed form, can be traced into the assets taken over by the Receiver. No augmentation occurred and consequently no tracing is possible, where the transaction resulted only in a shifting of bookkeeping credits on the books of the now insolvent National bank.

In the instant case the relationship of bailor and bailee was terminated five days prior to the bank's suspension when it exchanged the decedent's bonds for a bookkeeping credit then on its books. When the bank surrendered the bonds it no longer held any property in trust but had a mere personal obligation to the beneficiary for a breach of trust which results in a general claim only against the Receiver.

VI.

Argument.

Section 5236 U. S. R. S. (12 U. S. C. Ch. 2, Sec. 194) (App. p. 12) "provides for a distribution of the entire assets of the bank, giving no preference to any claim except for moneys to reimburse the United States for advances in redeeming the notes." *Cook County National Bank* v. *United States*, 107 U. S. 445, 450. With this, and two other exceptions, all of minor importance and not applicable here, even the United States, the States and their political subdivisions, must participate in the pro rata distribution unless they have taken the security provided by law.

The respondent can avoid participation in the statutory distribution only upon affirmative proof that the decedent's property, held by the bank as a bailment, passed in its original or changed form into the hands of the Receiver. The rule was stated by this court in *Texas & Pacific Railway* v. *Pottorff*, 291 U. S. 245, 261, note 19 as follows:

> "The claimant has the burden of identifying the property in its original or altered form. Schuyler v. Littlefield, 232 U. S. 707. It is not enough to show that at the time of receipt the general assets of the insolvent were increased or that debts were discharged. Wuerpel v. Trust Co., 238 Fed. 269, 272-3; Knauth v. Knight, 255 Fed. 677; State Bank of Winfield v. Alva Security Bank, 232 Fed. 847; In re See, 209 Fed. 172; In re Dorr, 196 Fed. 292; City Bank v. Blackmore, 75 Fed. 771; compare Railway v. Spiller, 274 U. S. 304, 311; Cunningham v. Brown, 265 U. S. 1."

We submit that an application of the above rule to the record facts in this case establishes the error of the decision of the court below. The respondent cannot identify the Liberty Bonds, in their original or altered form, in the hands of the Receiver because when the bonds passed from the bank, "debts were discharged" and nothing more.

"The cancellation of the credit balance by the debit neither suggests any intention to establish a trust nor points to any identifiable thing which could be the subject of it." *Blakey* v. *Brinson*, 286 U. S. 254, 263. "The very essence of the right of priority over other creditors depends upon the setting apart of a particular fund for the benefit of the depositor. There is no basis for giving one depositor a priority over another unless this is an essential part of the transaction." Mr. Justice Stone, "Legal Problems in the Transmission of funds." Columbia Law Review June 1921. Page 525.

The principles applied by this Court in disposing of the claim based on the Veesaert bonds in *Adams* v. *Champion*, 294 U. S. 231 when applied to the facts in the instant case

require the respondent to participate in the pro rata distribution and, we submit, the statement in the opinion of the court below (R. 36) that the cases can be distinguished is at least to this extent, incorrect. The Veesaert bonds and the bonds in the instant case were held by the banks in trust and were disposed of by the banks prior to their suspension. For the Veesaert bonds the bank received a solvent credit of $1,597.31 with a Chicago bank but as only $776.57 was admittedly traced to the Receiver this court denied the trust sought to be impressed for the remainder of $820.74 (page 239). The bonds in the instant case were surrendered by the bank in exchange for a transfer of bookkeeping credits and consequently the entire trust claim fails because of the inability to prove either augmentation or tracing of funds.

We submit that the decisions of both courts below in the instant case must be classified with the non-conforming cases referred to in this court's opinion in *Jennings* v. *U. S. F. & G. Co.*, 294 U. S. 216, 225 where it said: "Decisions of other courts, to the extent that they give support for a different conclusion are built, as we think, upon an inadequate analysis, and do not win our approval."

The Appellate Court said in its opinion in the instant case (R. 37):

> "With the District Judge, we think that the proceeds of these bonds augmented the assets of the bank. They certainly reduced its liability to others."

The error of this conclusion seems to be clearly established by the excerpt quoted from this court's opinion in *Texas & Pacific Railway* v. *Potorff*, *supra*, page 5, and the following excerpt from this court's opinion in *Jennings* v. *U. S. F. & G. Co.*, *supra*, pages 224, 225:

> "But the situation is very different when what has been received by the collecting agent is not a thing at all, but a reduction of liabilities by set-off or release. Blakey v. Brinson, supra; People v. Merchants & Me-

chanics Bank, 78 N. Y. 269, 272, 273; Hecker-Jones-Jewell Milling Co. v. Cosmopolitan Trust Company, supra, p. 187; City Bank v. Blackmore, 75 Fed. 771; Anheuser-Busch Brewing Association v. Clayton, 56 Fed. 759; Farmers National Bank v. Pribble, 15 Fed. (2nd) 175, 176; Dickson v. First National Bank, 26 Fed. (2nd) 411; Schilling v. Rowe, 64 Fed. (2nd) 188, 190; Allied Mills v. Horton, 65 Fed. (2nd) 708, 710; Smith v. Zemurray, 69 Fed. (2nd) 5, 6, 7; First National Bank of St. Petersburg v. Miami, 69 Fed. (2nd), 346; Wisdom v. Keen, 69 Fed. (2nd) 349. *A debt does not furnish a continuum upon which a trust can be imposed after cancellation or extinguishment has put the debt out of existence.*

"The truth of this statement, though obvious enough upon its face, finds point and confirmation when the benefit, if any, accruing to the debtor is viewed as of the time of insolvency or later. What was done by the collecting bank through a settlement in the clearing house has not increased the assets available for distribution in the hands of the receiver. What was done through that settlement has had no effect after insolvency except to diminish liabilities. The dividend that would be due upon the debts canceled through the set off if they were now to be revived is the measure of any benefit accruing to the creditors. Decisions of other courts to the extent that they give support for a different conclusion are built, as we think, upon an inadequate analysis, and do not win our approval. *It is the benefit to the creditors, not the loss to the respondent, that marks the gain to the fund now held by the receiver. If the respondent is permitted to prove against the assets on a parity with other creditors, the share thus allotted will correspond accurately to whatever accretion has resulted* from the act of set off and cancellation in the operations of the clearing house." (Italics ours.)

Many decisions of Circuit Courts of Appeal can be cited in conflict with the decision of the court below, including the decisions of the Fifth, Sixth, Seventh, Eighth and Ninth Circuits cited by this court in the excerpt just quoted. The

clear conflict of the decision of the court below with the decisions of other Circuits is best illustrated by a comparison with the recent opinion of the Circuit Court of Appeals for the Fourth Circuit (Parker, C. J.) in *O'Neal* v. *White*, 79 Fed. (2nd) 835, certiorari denied 297 U. S. 706, wherein the controlling facts are almost identical and the bonds converted were the property of an incompetent World War veteran. To quote from Judge Parker's opinion (p. 835):

> "This is a suit to declare assets in the hands of the receiver of a failed National bank subject to a trust, because of the sale by the bank of *certain bonds which it held in trust for plaintiff*. It is stipulated that the bank received in payment of the bonds checks drawn by two of its customers on their accounts with it; and there is no showing that its assets were augmented in this or in any other way as a result of the conversion and sale of the bonds. The checks of the customers of the bank received in payment of the bonds resulted in a mere shifting of credits on the books of the bank, and nothing more; and this is not an augmentation of the bank's assets. *It is well settled that, in such case, a trust will not be declared with respect to the assets in the hands of the receiver.* Spradlin v. Royal Mfg. Co. (C. C. A. 4th) 73 Fed. (2nd) 776; Lifsey v. Goodyear Tire & Rubber Co. (C. C. A. 4th) 67 Fed. (2nd) 82; Harmer v. Rendleman (C. C. A. 4th) 64 Fed. (2nd) 442." (Italics ours.)

The claimant advanced substantially the same contentions in said case as were relied upon by the claimant and the Courts below in support of a preferred claim in the instant case. Judge Parker discussed and rejected these theories and reversed the District Court's allowance of a trust claim against the assets taken over by the Receiver.

On the same day the Circuit Court of Appeals for the Fourth Circuit decided another Liberty Bond case, *Marchant* v. *Summers*, 79 Fed. (2nd) 877, with a dissenting opinion by Judge Northcott. The majority opinion by Judge Parker sets out many authorities discussing the rights of the parties in these transactions including *Kohler*

v. *Spurway*, 28 Fed. (2nd) 36 and *Gwynn* v. *Spurway*, 28 Fed. (2nd) 37.

We have little complaint against the following statement of the rights of the parties quoted from the opinion of the court below, pages 1001, 1002:

> "Mrs. Rauch simply left the bonds with the bank 'for safe keeping only.' The bank was the mere custodian of the bonds, and title to them never passed to the bank. Mrs. Rauch or the administrator of her estate had the right to follow them in the original, or in some other substituted, form. The right of the administrator to pursue the bonds, or the money into which they had been converted into the hands of the receiver of the bank, depends upon the fact that title to the bonds, or the money representing them, was in the administrator, and not upon the relation of debtor and creditor, or upon the ground of a debt due and owing, Cox v. St. Anthony Bank & T. Co., 41 Idaho, 776, 242 P. 785; Windstanley v. Second Nat. Bank, 13 Ind. App. 544, 41 N. E. 946; Andrew v. State Bank, 205 Iowa 1064, 217 N. W. 250, or of compensation for the loss of property, Myers v. Matusek, 98 Fla. 1126, 125 So. 360; Daughtry v. International Bank, 18 N. M. 119, 134 P. 220, or on the ground of unlawful conversion of property, Hanover Nat. Bank v. Thomas, 217 Ala. 494, 117 So. 42; Holdbrook Irr. Dist. v. First State Bank, 84 Colo. 157, 268 P. 523. Title never passed to the bank. The administrator is merely seeking to recover his own property or the proceeds thereof, and it is the duty of the court to lend its aid to the owner in reclaiming his property."

Applying these principles to the record facts it is clear that the administrator cannot trace the bonds in their original or changed form to the Receiver. The court speaks of "the bonds or the money into which they have been converted." The difficulty in this case is that the bonds were never converted into money but were exchanged for a bookkeeping credit. Nor do we disagree with the further statement in the court's opinion at page 1002 "There is no question about the facts in this case nor about the fact that the

bonds were sold * * *." Our complaint is against the remaining language of the sentence wherein the court states "that the proceeds went into the funds of the bank, where they still remain in the possession of the Receiver." Nothing in the Federal decisions cited by the court below suggests that a trust res continues after, as in the instant case, it has been exchanged for a credit balance already on the books of the bank which formerly held the trust res or that a tracing of the proceeds to the Receiver is possible under such circumstances.

Assuming it may be suggested (in opposition) that augmentation occurred at the moment the officer of the bank wrongfully appropriated the bonds of Mrs. Rauch for the purpose of selling them to Josiah and/or Rose Lohr, it nevertheless clearly appears that the proceeds derived by the bank from the sale of said bonds are not in a form to admit of tracing an identifiable and recoverable res in the hands of the Receiver, inasmuch as said proceeds consisted only of an exchange of bookkeeping credits which, of course, did not constitute an augmentation of the bank's assets nor a basis of tracing assets to the receiver.

What the bank in substance did was to pay or discharge the depositary debt it owed the Lohrs to the extent of the agreed sale price of the bonds by selling to the Lohrs the bonds of the claimant and entering a corresponding charge against their deposit account. As previously indicated the discharge of a liability is *not* tantamount or equivalent to augmentation of assets.

This is not a case of theft or intended fraud but is one wherein an officer of the bank, without authority from its Board of Directors, undertook innocently to accommodate a customer of the bank who sought to buy Liberty bonds, it being the intent to purchase similar bonds in substitution immediately, as indicated by the act of the officer, *the next day* in sending the broker a cashier's check for that purpose (R. 20). A breach of trust was committed but, as indicated in *Old Company's Lehigh* v. *Meeker*, 294 U. S. 227, 230,

> "If this be so, the wrong does not avail to charge a trust upon the assets whereby the plaintiff will have a preference over the creditors at large. A cause of action for damages may exist, upon which the plaintiff, making proper proof, will be entitled to a dividend."

The record establishes that the bank Receiver has always been willing to accept such a claim (R. 21, 25).

VII.

Conclusion.

It is believed that the foregoing discussion establishes that the decision of the court below is in conflict with the decisions of this court and with the decisions of other Circuit Courts of Appeal; that no trust can be impressed upon the assets of the bank that passed to the Receiver; that the decision of the court below should be reversed and the respondent required to participate in the pro rata distribution provided by law.

Respectfully submitted,

GEORGE P. BARSE,
JOHN F. ANDERSON,
Attorneys for Petitioner.

APPENDIX.

TITLE 12 U. S. C. A., Sec. 194.

DIVIDENDS ON ADJUSTED CLAIMS; DISTRIBUTION OF ASSETS.

From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held. (R. S. 5236.)

FILE COPY

Office - Supreme Court, U. S
FILED
FEB 12 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 563.

PARK L. HOFFMAN, Substituted for R. G. HOLSING, Receiver of First National Bank of Boswell, Pennsylvania,
Petitioner,

v.

HENRY I. RAUCH, Administrator, Emiline B. Rauch, late of Jenner Township, Somerset County, Pennsylvania,
Respondent.

REPLY BRIEF OF PETITIONER.

GEORGE P. BARSE,
JOHN F. ANDERSON,
Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

CASES CITED.

	Page
Adams v. Champion, 70 Fed. (2nd) 956; 294 U. S. 231	4, 6
Blakey v. Brinson, 286 U. S. 254	2, 3
Brown v. Botkin, 13 Fed. Supp. 1000	8
Farmers National Bank v. Pribble, 15 Fed. (2nd) 175	7
Frelinghuysen v. Nugent, 36 Fed. 229	1
Jennings v. U. S. F. & G. Co., 294 U. S. 216	7, 8
Kershaw v. Jenkins, 71 Fed. (2nd) 647	1, 2
O'Neal v. White, 79 Fed. (2nd) 835, 297 U. S. 706	3, 6
Peters v. Bain, 133 U. S. 670	1, 2
Pottorff v. Key, 67 Fed. (2nd) 833	3
Schumacher v. Harriett, 52 Fed. (2nd) 817	1, 3
Schuyler v. Littlefield, 232 U. S. 707	4
Wisdom v. Keen, 69 Fed. (2nd) 349	8

ANNOTATIONS.

82 A. L. R. 46 to 288	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 563.

PARK L. HOFFMAN, Substituted for R. G. HOLSING, Receiver of First National Bank of Boswell, Pennsylvania,
Petitioner,

v.

HENRY I. RAUCH, Administrator, Emiline B. Rauch, late of Jenner Township, Somerset County, Pennsylvania,
Respondent.

REPLY BRIEF OF PETITIONER.

In his short brief the respondent cites the following four Federal decisions as supporting the contention that a trust can be impressed upon the assets that passed to the Receiver in this case:

Peters v. *Bain*, 133 U. S. 670.
Kershaw v. *Jenkins*, 71 Fed. (2nd) 647 (C. C. A. 10th).
Schumacher v. *Harriett*, 52 Fed. (2nd) 817 (C. C. A. 4th).
Frelinghuysen v. *Nugent*, 36 Fed. 229.

On page 2 of his brief the respondent quotes part of the excerpt from the opinion in Frelinghuysen v. Nugent quoted by this court at page 693 in its opinion in *Peters* v. *Bain*. Had the respondent continued the quotation plus this court's comment thereon, which we quote from pages 693 and 694, he would have established that Peters v. Bain supports the position of the petitioner and not that of the respondent:

> " 'This is as far as the rule has been carried. The difficulty of sustaining the claim in the present case is, that it does not appear that the goods claimed—that is to say, the stock on hand, finished and unfinished—were either in whole or in part the proceeds of any money unlawfully abstracted from the bank.' The same difficulty presents itself here, and while the rule laid down by Mr. Justice Bradley has been recognized and applied by this court, National Bank v. Insurance Company, 104 U. S. 54, 67, and cases cited, yet, as stated by the Chief Justice, 'purchases made and paid for out of the general mass cannot be claimed by the bank, unless it is shown that its own moneys then in the fund were appropriated for that purpose.' And this the evidence fails to establish as to any other property than that designated in the decree, * * *"

In the instant case we know what happened to the respondent's bonds. They were used by the bank to reduce its debts to others. Neither the bonds nor any proceeds therefrom passed to the Receiver.

Kershaw v. *Jenkins*, 71 Fed. (2nd) 647, also supports the position of the petitioner and not that of the respondent. Jenkins' check was charged against his pre-existing credit balance to purchase Liberty bonds, and the bank's cashier's check was issued but no bonds were purchased or segregated from those held by the bank, prior to its suspension. The Appellate Court held that the case fell within *Blakey* v. *Brinson*, 286 U. S. 254, and reversed the trial court's allowance of a trust against the bank's assets that passed to the Receiver.

It cannot be denied that *Schumacher* v. *Harriett*, 52 Fed. (2nd) 817, gives the respondent assistance to the extent that it holds that if a bank misuses a claimant's property it must be deemed to have set apart as a trust res an equivalent value of its cash assets. We submit, however that, to this extent, Schumacher v. Harriett does not correctly state the Federal rule. In commenting upon this phase of the Harriett decision, the Circuit Court of Appeals for the Fifth Circuit said in *Pottorff* v. *Key*, 67 Fed. (2nd) 833, 834:

> "Such a doctrine amounts to saying that in every case of misapplied money or money's equivalent the wrongdoer's other cash and cash items stand in its place so long as he has any, establishing in effect a general lien on all such. 'If the plaintiff's contention be well founded, and to follow misappropriated moneys it is only necessary to show that a receiver has, and that the trustee had, assets, the rule is simply that a demand for such moneys is a preferred claim against any substantial estate. To adopt this view is to do away with all the equitable principles out of which the right to follow trust funds grew.' American Can Co. v. Williams (C. C. A.) 178 F. 420, at page 423. We hold in this connection that, if a trust res can be followed, it must be; and that a lien by confusion can be fixed on a fund only when the confusion is actual and when the fund is shown to have really received and to still contain the trust res or its proceeds. The judgment is reversed, with direction to disallow appellee's claim as preferred and to allow it as a general claim only."

Schumacher v. *Harriett* was a companion case to *Schumacher* v. *Brinson*, which was reviewed by this court and reversed as *Blakey* v. *Brinson*, 286 U. S. 254. Judge Parker, the author of the opinion in *Schumacher* v. *Harriett*, wrote the opinion in *O'Neal* v. *White*, 79 Fed. (2nd) 835, certiorari denied 297 U. S. 706, discussed in our main brief, page 8, and denied a trust claim wherein the controlling facts are almost identical with those in the instant case. The liberal tracing rule of *Schumacher* v. *Harriett* was relied on by the Circuit Court of Appeals for the Seventh Circuit in

impressing a trust on the assets of a National bank that passed to the Receiver in *Adams* v. *Champion*, 70 Fed. (2nd) 956, but the Harriett rule was in effect rejected by this court when it reversed the Appellate Court in 294 U. S. 231.

We do not believe it necessary to discuss the minority view reflected in the State decisions cited by the respondent. The reasoning of these State decisions was rejected by this court in the recent cases cited at pages 6 and 7 in our main brief and by many decisions of the lower Federal Courts. This conflict is treated at length in a comprehensive annotation in 82 A. L. R., pages 46 to 288, and the State decisions listed in the opinion of the court below (R. 36) will be found at page 50 of the annotation.

On Page 2 of "appellee's brief" respondent seems to suggest a distinction between a trust "ex maleficio" and a trust arising by formal agreement of parties. He does not, however, seem to indicate any difference as to the necessity in each case of augmentation and tracing, his discussion being confined primarily to attempting to establish a liberalization of the augmentation and tracing doctrines.

It may be pointed out here, however, that the necessity of augmentation and tracing, as a prerequisite to the allowance of a priority or preferred claim against the assets of an insolvent estate which is being administered for the benefit of all creditors, is just as rigidly required in the case of a trust ex maleficio, as it is in the case of violation of a trust created by formal agreement.

The decision and opinion of this court in *Schuyler* v. *Littlefield*, 232 U. S. 707, 711, 713, is directly in point, by analogy so far as the present discussion is concerned. It appears that Brown and Company, who were brokers in New York City, obtained certain shares of stock from the plaintiffs by fraudulent representations. At that moment a trust ex maleficio or constructive trust arose and Brown and Company became trustees ex maleficio with the shares of stock constituting the *res* of said trust. Thereafter they sold the stock and received certain checks in payment,

and deposited said checks in bank and subsequently apparently checked out the proceeds arising from the sale of said stock. The court disallowed the preference claim and in that connection said:

> "It thus appeared that the stock fraudulently obtained by Brown & Co. had been sold by them, with other stock, to Miller who paid for the whole in two checks—one for $266,600 deposited to Brown & Co.'s account in the Hanover National Bank on August 24th, and another for $23,000 deposited in the same bank on August 25th.
>
> 1. If the trust fund of $9,600 was included in the check for $266,600, then it was dissipated except to the extent of $6,180.17, which was the sum left to Brown & Co.'s credit at the close of business on August 24th. And inasmuch as all of that balance was paid out early the next day, the trust fund was thereby wholly dissipated so far as the bank account was concerned.
>
> If, however, the trust fund of $9,600 is to be treated as having been included in Miller's check for $23,000 then a similar result follows, though on this point the evidence of the witnesses and the findings of the two courts are in conflict.
>
> * * * * * * *
>
> It would serve no useful purpose to make a detailed statement of the testimony. The evidence has been fully discussed by the Court of Appeals (193 Fed. Rep. 24-33) in considering this claim of appellants along with that of several other parties seeking, on somewhat similar facts, to trace trust funds into the bank and thence into collateral which ultimately came into the hands of the Trustee. All these claims were disallowed because of the failure to make the requisite proof. Our investigation of the facts leads us to the same conclusion so far as concerns the appellants' claim. They were practically asserting title to $9,600 said to have been traced into stock in the possession of the Trustee. Like all other persons similarly situated, they were under the burden of proving their title. If they were unable to carry the burden of identifying the fund as representing the proceeds of their Inter-

borough stock their claim must fail. If their evidence left the matter of identification in doubt the doubt must be resolved in favor of the Trustee, who represents all of the creditors of Brown & Co., some of whom appear to have suffered in the same way. Like them, the appellants must be remitted to the general fund."

Reference in this connection also may be made to our discussion on pages 5 and 6 of our main brief of that portion of this court's opinion relating to the Veesaert bonds in *Adams* v. *Champion*, 294 U. S. 231, 239, where this court said:

"3. The fourth contested item, the collection on the Veesaert bonds, differs from the others in that *payment was received after the trustee in bankruptcy had elected to avoid the preference* and had sued for that relief.

The payment was made as we have seen, by the deposit of $1,597.31 in the First National Bank of Chicago, Illinois.

The balance in that account was reduced in 1931 to $776.57. What became of the difference ($820.74) there is nothing to inform us. *Evidence is lacking that it was withdrawn in such a form or for such purposes as to be represented by any assets forming part of the estate today.* The receiver consents that this item of $776.57, the balance in the Chicago bank, be paid to the respondent as a preferred charge upon the fund.

The decree is reversed and the cause remanded for further proceedings in accordance with this opinion." (Italics inserted.)

Further in connection with the foregoing point we cited and discussed, on Page 8 of our main brief, the case of *O'Neal* v. *White*, 79 Fed. (2d) 835, and stated in that connection that the controlling facts therein were almost identical with the facts in the instant case. The transcript of record in that case is on file in this honorable court in connection with an application for writ of certiorari (which was denied,—297 U. S. 706). The reported opinion of the Circuit Court of Appeals in the case does not give the de-

tails concerning the circumstances under which the bonds were held in trust.

However, if the Court desires to do so, an examination of the transcript of record in that case (at Page 13 thereof) will disclose that the bank held the bonds in its "safekeeping department" for the owner, and that

> "4. Thereafter said bank, on or about 8th and 20th August, 1929, without the knowledge or consent of said guardian, took his said bonds and sold them for the sum of $7,032.47, which it commingled with its assets. Said guardian never ratified such sale of his bonds and was ignorant thereof until after the bank closed."

It may also be noted that in *O'Neal* v. *White* it does not appear that any attempt was made by the bank to purchase other bonds in substitution of the bonds, whereas in the instant case the officer of the bank did endeavor, apparently in entire good faith, on the day after the sale of the bonds, to purchase other bonds for replacement. (R. 20)

The respondent says at page 4 of his brief: "A discharge or reduction of a liability produces a corresponding increase in assets." This contention has always been rejected by the Federal Courts and most of the State courts. To quote from *Farmers National Bank of Burlington* v. *Pribble* (C. C. A. 8th), 15 Fed. (2nd) 175-176, cited by this court with approval in *Jennings* v. *U. S. F. & G. Co.*, 294 U. S. 216, 224:

> "The fact that the claimant's property paid or reduced the indebtedness or liability of the insolvent corporation, so that it will pay a larger percentage of the debts, justifies no lien on its assets by or preference in payment to the cestui que trust (1) because such a reduction of indebtedness does not increase the property or the value of the property of the insolvent; and (2) because the property of the claimant so used to pay a part of the insolvent's general indebtedness or liability never goes into, and therefore cannot be traced into, the property or assets of the insolvent which subsequently come into the possession of the receiver. Titlow v. McCormick, 236 F. 209, 149 C. C. A. 399; American

> Can Co. v. Williams (C. C.), 176 F. 816; Lucas County v. Jamison (C. C.), 170 F. 338; Multnomah v. Oregon National Bank (C. C.), 61 F. 912; Beard v. Independent School District, 88 F. 375, 31 C. C. A. 562; Hecker-Jones-Jewell Mill. Co. v. Cosmopolitan Trust Co., 242 Mass. 181, 136 N. E. 333, 24 A. L. R. 1148."

The respondent suggests, page 2 of his brief, that the large number of bank failures in recent years has led many courts to adopt more liberal doctrines with reference to tracing of funds. We deny that this is so. Certainly the contrary is true of all recent Federal court decisions, including the recent decisions of this court, as pointed out by Judge Raymond, citing many authorities, in his excellent discussion of these claims in *Brown* v. *Botkin*, 13 Fed. Supp. 1000, 1003.

In concluding that the decision of the court below is just and equitable the respondent fails to consider the equal equities of the depositors and other creditors who will suffer a substantial loss through their dealings with the bank and whose funds were in no way enriched by the sale of the bonds. As stated in *Wisdom* v. *Keen*, (C. C. A. 5th) 69 Fed. (2nd) 349, 350, cited by this court with approval in *Jennings* v. *U. S. F. & G. Co.*, 294 U. S. 216, 224:

> "By their mutual intent the bank's relation to Keen was that of a trustee rather than a debtor, but there is still no identifiable trust res traceable as such, but only a liability for a breach of trust in failing to create the res. This liability, absent a statutory priority or lien, has no higher dignity than other general liabilities. As to every general creditor the bank has failed to do what it ought to have done and what it promised to do. The federal statute puts all such claimants on an equality. Even claims due the United States have no preference. Cook County National Bank v. United States, 107 U. S. 445, 2 S. Ct. 561, 27 L. Ed. 537."

Respectfully submitted,

GEORGE P. BARSE,
JOHN F. ANDERSON,
Attorneys for Petitioner.

FREE COPY

FILED
FEB 2 1937
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 563

PARK L. HOFFMAN, SUBSTITUTED FOR R. G. HOLSING, RECEIVER OF FIRST NATIONAL BANK OF BOSWELL, PENNSYLVANIA,

Petitioner,

vs.

HENRY I. RAUCH, ADMINISTRATOR, EMILINE B. RAUCH, LATE OF JENNER TOWNSHIP, SOMERSET COUNTY, PENNSYLVANIA,

Respondent.

APPELLEE'S BRIEF.

LELAND W. WALKER,
Biesecker Bldg.,
Somerset, Penna.,
Attorney for Appellee.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 563

PARK L. HOFFMAN, SUBSTITUTED FOR R. G. HOLSING, RECEIVER OF FIRST NATIONAL BANK OF BOSWELL, PENNSYLVANIA,

Petitioner,

vs.

HENRY I. RAUCH, ADMINISTRATOR, EMILINE B. RAUCH, LATE OF JENNER TOWNSHIP, SOMERSET COUNTY, PENNSYLVANIA,

Respondent.

APPELLEE'S BRIEF.

The plaintiff seeks to recover on a preferred status in the distribution of a closed bank's assets. The claim has been predicated upon a wrongful act of the bank for which the law construes it to be a trustee "*ex malificio*". In general, a trust relationship is either a formal one, or it arises by operation of law; the former by agreement expressed or implied; the latter by reason of the "*mala fides*" of one in a fiduciary position (here bailee) whom the law designates a "trustee *ex malificio*". Tracing rules have differed accordingly.

While the law may construe the relationship between the parties to be that of a trust, this does not of itself entitle the claimant to a preferred position in a bank's liquidation.

In the "past", to maintain a preference, the claimant was required to trace specifically and identify his property in the wrongdoer's hands and failure to do so defeated his rights no matter what equities were in his favor. The mere receipt or conversion of trust property by a defendant was insufficient to entitle the claimant to a preference.

However, the numerous bank failures following the boom of 1929 and their subsequent exposure of wrongful and improper acts of banks in the conduct of their business and in their handling of clients property led many courts to adopt more equitable and liberal doctrines of tracing in order to sustain a cestui's claim of preference. The old rule requiring strict tracing of property and identifying proved too exacting and inequitable. The *United States Supreme Court* in *Peters* v. *Bain*, reported in 133 United States Reports at 670, recognizing the severity of the old rule requiring tracing said:

> "Formerly the equitable right of following misapplied money or other property into the hands of the parties receiving it depended upon the ability of identifying it; the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase or sale. But if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority over the general creditors of the possessor".

A doctrine previously adopted by only a few courts, but recently adopted in many jurisdictions, including those which previously adhered to strict tracing requirements, is one which is popularly known as the "augmentation" or

"unjust enrichment" theory. This doctrine may be stated that while it may be impossible to follow the fund in its diverted uses, it is always possible to make it a charge upon the estate or assets, to the increase or benefit of which it has been appropriated. The general assets of the bank having received the benefit of the unlawful conversion, there is nothing inequitable in charging them with the amount of the converted fund, as a preferred claim. Otherwise, general creditors would share in assets to which they are not entitled, the entire fund having been improperly augmented. It is only necessary for the claimant to show that the general assets of the bank passing into the hands of the receiver were previously augmented by the trust *res*. and this being shown, a trust is impressed on all the assets in the receivers hands and no confusion can destroy the principal's right to a preferred status in this distribution.

Kershaw v. *Jenkins*, 71 F. (2d) 647 (C. C. A., 10th, 1934); *Schumacker* v. *Harnet*, 52 F. (2d) 817 (C. C. A., 4th, 1931); *Frelinghuysen* v. *Mugent*, 36 Fed. 229 (D. N. J., 1888); *Farmers Trust Company* v. *Lauderdale Bank & Trust Company*, 114 Fla. 84, 153 So. 93 (1934); *People* v. *Bates*, 351 Illinois 439, 184 N. W. 597, 1933); *Bank of Poplar Bluff* v. *Millspaugh*, 313 Missouri 412, 281 S. W. 733 (1926); *State* v. *Farmers State Bank of Polk*, 121 Nebraska 547, 237 N. W. 862 (1931); *School District* v. *Schramm*, 142 Oregon 296, 20 P. (2d) 241 (1933); *State* v. *Bank of Bristol*, 166 Tennessee 581, 64 S. W. (2d) 22 (1933); *Bank of Danville* v. *Commercial Bank & Trust Company*, 163 Virginia 162, 175 S. E. 775 (1934); *Cameron* v. *Carnegie Trust Company*, 292 Pennsylvania 114, 140 Atl. 768 (1928).

In this case the Bank used bonds left with it for "safe keeping only" in discharge of its liabilities (depository account) and was thereby saved the use of its own funds for that purpose and the assets of the bank at the time of closing were therefore larger in amount than they otherwise

would have been. A discharge or reduction of a liability produces a corresponding increase in assets. For every debit there must be a credit.

The opinion by the Honorable Judge Davis of the United States Circuit Court of Appeals for the Third Circuit is a proper application of the facts to the law and a most just and equitable opinion. For the sake of economy, as the amount involved is small and the estate of the claimant poor and with no cash or liquid assets, comment of the cases referred to by Judge Davis in his opinion is omitted.

Respectfully submitted,

LELAND W. WALKER,
Attorney for Appellee.

(8655-C)

SUPREME COURT OF THE UNITED STATES.

No. 563.—October Term, 1936.

Park L. Hoffman, Substituted for R. G. Holsing, Receiver of First National Bank of Boswell, Pennsylvania, Petitioner,
vs.
Henry I. Rauch, Administrator, Emiline B. Rauch, Late of Jenner Township, Somerset County, Pennsylvania.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[March 1, 1937.]

Mr. Justice McReynolds delivered the opinion of the Court.

The First National Bank, Boswell, Pennsylvania, was declared insolvent January 26, 1932. Shortly thereafter a receiver took charge.

January 21, 1932, the bank's cashier, without her consent, sold four Liberty Bonds ($100.00 each), belonging to Mrs. Rauch and held by it for safekeeping, to the Lohrs. The purchase price was charged to their deposit account.

Mrs. Rauch died June 2, 1932. Claiming a preference respondent, her administrator, refused the receiver's offer of a general claim against the estate and brought suit. Upon a directed verdict the administrator obtained judgment as a preferred creditor. The court was of opinion "that the assets of the bank were augmented when the bank received from its customer the price agreed upon for said bonds and, therefore, that the plaintiff is entitled to participate in the distribution of the assets of the defendant bank as a preferred creditor." The Circuit Court of Appeals affirmed with an opinion which states: "With the District Judge, we think that the proceeds of these bonds augmented the assets of the bank. They certainly reduced its liability to others."

Petitioner maintains that the bank's assets were not increased through sale of the bonds; that nothing arose therefrom which in

original or changed form can be traced into the hands of the receiver.

Respondent submits that since the bank used the bonds in discharge of a liability it "was thereby saved the use of its own funds for that purpose and the assets of the bank at the time of closing were therefore larger in amount than they otherwise would have been. A discharge or reduction of a liability produces a corresponding increase in assets. For every debit there must be a credit."

Obviously, nothing of value was added to the bank's property. Nothing new came into its treasury. A credit entry against an outstanding obligation represented the only possible benefit. Its total liabilities were not reduced since a new obligation arose to pay to the owner the value of the bonds.

Here it is accepted doctrine that when a claim is made for preference against funds held by the receiver of a national bank the burden is upon the claimant to establish his title; he must definitely trace something of value which belonged to him, or the avails therefrom, into the receiver's possession. *Schuyler* v. *Littlefield,* 232 U. S. 707, 713; *Texas & Pacific Railway Co.* v. *Pottorff, Receiver,* 291 U. S. 245, 261. Also, a mere showing that the bank wrongly used property of another in discharging its indebtedness does not suffice to establish a preferred claim against the receiver.

Accordingly, we must hold that the courts below were in error and reverse the challenged judgment.

The applicable legal principles were much discussed in *Blakey, Receiver,* v. *Brinson,* 286 U. S. 254; *Texas & Pacific Railway Co.* v. *Pottorff, Receiver, supra; Jennings, Receiver, et al.* v. *United States Fidelity & Guaranty Co.,* 294 U. S. 216; *Old Company's Lehigh, Inc.* v. *Meeker, Receiver, et al.,* 294 U. S. 227; *Adams, Receiver,* v. *Champion, Trustee in Bankruptcy,* 294 U. S. 231; and *Farmers' National Bank of Burlington, Kansas, et al.* v. *Pribble,* 15 F. (2d) 175, 176.

Jennings, Receiver, et al. v. *United States Fidelity & Guaranty Co., supra,* pp. 224-225, said: "But the situation is very different when what has been received by the collecting agent is not a thing at all, but a reduction of liabilities by set-off or release . . . A debt does not furnish a continuum upon which a trust can be imposed after cancellation or extinguishment has put the debt out of

existence . . . The dividend that would be due upon the debts canceled through the set-off if they were now to be revived is the measure of any benefit accruing to the creditors." In *Old Company's Lehigh, Inc.* v. *Meeker, Receiver, et al., supra,* p. 229, we asserted: "What was done by the Mamaroneck bank on January 14, 1933, did not involve in its doing the creation of a special deposit or an augmentation of the assets. What was done had no effect except to diminish liabilities by reducing the indebtedness due to a depositor." And *Adams, Receiver,* v. *Champion, Trustee in Bankruptcy, supra,* denied preference in respect of so much of a bank credit arising from the wrongful disposal of bonds as had been withdrawn prior to the receivership. Only the balance came to the receiver. We said, (239): "Evidence is lacking that it was withdrawn in such a form or for such purposes as to be represented by any assets forming part of the estate today."

Respondent was not entitled to a preference. His right to participation as a general creditor is conceded.

The cause must go back to the District Court with directions to proceed in accordance with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.